

REFLECTIONS ON THE PROPOSED OHIO LAW OF HOMICIDE

*All men agree that in general it is desirable to prevent homicide and bodily injury. The scope of reasonable controversy is therefore limited to the way in which the criminal law can and should operate to this end.*¹

I. INTRODUCTION

In the hierarchy of human values that underly the formation of a rational penal law, the sanctity of human life and the prevention of bodily injuries should rank as the apex of the system. Certainly, it could not be denied that foremost in the thoughts of men is the continuance of existence and bodily security. Death and physical injury are surely the most personal and aggravating forms of harm that a criminal code could proscribe. If the desire to structure conduct is at the heart of a code of criminal law, penalties should be directed at harmful conduct that causes loss of life or bodily injury. A pure ethical position, therefore, would assert that it is desirable to preserve all human life and that all conduct that causes homicides and bodily injuries should be punished. However, historically and pragmatically Anglo-American jurisprudence has not viewed all homicides and bodily injuries to require the imposition of criminal sanctions.² Thus, homicides and bodily injuries have been classified as noncriminal because they were thought to be either desirable (war and capital punishment), justifiable (self-defense), or excusable (accidental). The gradations of homicides and physical injuries in modern criminal codes have involved the attempt to discover adequate criteria (1) to distinguish criminal conduct from conduct that is not culpable or where a civil remedy is sufficient, and (2) to distinguish serious criminal conduct that merits the ultimate sanction from criminal behavior that may be disciplined with lesser forms of punishment.³

Within this narrowed scope of inquiry, the purpose of the law of homicide should be the prevention of proscribable harm by the punishment of individuals in accordance with their actions and state of mind.⁴ The com-

¹ Wechsler and Michael, *A Rationale of the Law of Homicide*, 37 COLUM. L. REV. 701, 702 (1937) [hereinafter cited as Wechsler and Michael].

² *Id.* at 726-52. Wechsler and Michael's thesis recognizes that although it is generally desirable to preserve all human life, if the criminal law were to discourage all conduct that involved a homicidal risk, highly desirable behavior would be discouraged to the detriment of society. See MODEL PENAL CODE § 201.1, Comment (Tent. Draft No. 9, 1959) [hereinafter cited M.P.C. (Tent. Draft No. 9)]; Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1114-15 (1952); Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1432 (1968).

³ Wechsler and Michael, *supra* note 1, at 726-33; Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1432, 1435 (1968).

⁴ In a criminal code's classification system, differences between non-culpable and culpable conduct and between various ranges of culpable conduct should be made with ref-

mon goals of punishment—deterrence (specific and general), incapacitation, and rehabilitation—should facilitate this purpose of prevention. Punishment, therefore, should be confined to conduct that can usefully be made a target of preventive effort.⁵ Proper targets of preventive action include those individuals who may be deterred and those individuals who may be so dangerous to society that they require incapacitation. Thus, the degree of criminal sanction that should be utilized in the punishment of any homicidal offense should be gauged in relationship to the amount of punishment that is necessary to effect the function of general and specific deterrence or incapacitation.⁶

However, more than any other area of the criminal law, sanctions for criminal homicide are based upon a retributive or revenge theory.⁷ Although the efficacy of retribution as a goal of the criminal law has been rejected by many modern commentators,⁸ the retributive model of punishment has been thought to have some lingering value in the homicide area where the outrage of society is reflected in the expiation by punishment.⁹ But a pure retributive theory for the imposition of criminal sanctions (that is, punishment solely because of a moral wrong) undercuts the other goals

erence to the state of mind and behavior of individuals with the concomitant results of their conduct defining the possibilities of criminal sanctions. *But see* Hadden, *Offenses of Violence: The Law and Facts*, 1968 CRIM. L. REV. 521. Professor Hadden's thesis attempts to establish from existing social and factual evidence that traditional *mens rea* categories often bear very little relation to the realities that courts must deal with and to make any real progress in codification less attention should be given to the mental element and more to the total situation of the offense. Such a theory is reflected in the manslaughter section of the Proposed Code. See Final Report of the Technical Committee to Study Ohio Criminal Laws and Procedures, PROPOSED OHIO CRIMINAL CODE § 2903.03(a) (1971) [hereinafter cited as PROP. OHIO CRIM. CODE]. The text of the proposed legislation is incorporated in HOUSE BILL NUMBER 511, 109th Ohio General Assembly (1971) [hereinafter cited as H.B. 511].

⁵ Wechsler, *supra* note 3, at 1432. "If fault is to be found with human conduct because it is offensive in its nature, potentialities or consequences, it surely is essential that the actor knew or should have known the facts that give it this offensive character." *Id.* at 1435. See Danforth, *Model Penal Code and Degrees of Criminal Homicide*, 11 AM. U.L. REV. 147, 168 (1962) [hereinafter cited as Danforth]. (If the purpose of law is to apply by sanction a countermotive to crime, it must assume a rational mind capable of seeing and evaluating the warning.) See also Wechsler and Michael, *supra* note 1, at 736-52.

⁶ For a study of the efficacy of deterrence that points to the problems of the length of the sanction and the certainty of its imposition, see F. ZIMING, *PERSPECTIVES ON DETERRENCE* 32, 83-92 (1971). Besides its questionable effectiveness, the goal of rehabilitation is a neutral concept that is applicable and functional regardless of the length of the imposed sentence.

⁷ Danforth, *supra* note 5, at 167.

⁸ See Danforth, *supra* note 5; Wechsler and Michael, *supra* note 1, at 730 n.126. Compare Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1115 (1952) (gradations within a criminal code may even reflect the punitive response that public opinion demands), with Wechsler, *supra* note 3, at 1432 (penal law should not be used to express the pious sentiment of the community).

⁹ In utilitarian terms the retributive effect of the criminal sanction is needed because in its absence the law would fall into disrepute and private retribution would take the place of public sanctions. See E. DURKHEIM, *THE DIVISION OF LABOR AND SOCIETY* 108-09 (Simpson trans. 1933) (criminal law not closely akin to the morals of society will be repudiated).

of the criminal law and is insufficient by itself to support a rational system of penal sanctions because application of this theory does not help to protect society but merely reacts to social harm. In a system that stresses the *prevention* of harm, any incremental amount of punishment more than that required for effective deterrence would seem to represent a retributive sanction. Indeed, any sentence for a homicidal crime that is imposed for a length of time beyond that which is needed for deterrence seems to be an illegitimate use of punishment because the accretion does not add to the security of human life. Thus, the inclusion of retributive manifestations within a rational penal law revision does not aid in fulfilling the purpose of the law of homicide and actually may detract from other theories of punishment that do.

In this comment an attempt will be made to uncover the rationale guiding the formulation of the law of homicide in the Proposed Ohio Criminal Code¹⁰ and to compare that formulation and rationale with trends in modern penal code revisions as well as with the structure of the present Ohio law. Because much of the work of distinguishing between criminal conduct and non-criminal conduct has been done in the proposed sections on culpable mental states¹¹ and defenses,¹² the scope of this comment will be limited to a discussion of the effects of the Proposed Code on the present Ohio law and of possible alternative formulations that would serve the goals of the criminal law in a more efficient and rational way.¹³ Before the initiation of discussion on the proposed law of homicide, however, one basic criticism that applies throughout the analysis of the homicide provisions should be emphasized. Generally, the Proposed Code's sanctions in the homicide area repre-

¹⁰ Final Report of the Technical Committee to Study Ohio Criminal Laws and Procedures, PROPOSED OHIO CRIMINAL CODE (1971). [hereinafter cited as PROP. OHIO CRIM. CODE]. The text of the proposed legislation is incorporated in HOUSE BILL NUMBER 511, 109th General assembly (1971) [hereinafter cited as H.B. 511].

¹¹ PROP. OHIO CRIM. CODE § 2901.22.

¹² PROP. OHIO CRIM. CODE §§ 2901.31-38. The sections on culpable mental states and defenses represent a codification and revision of the present Ohio statutory and common law. Full discussions of these sections are the subjects of other comments in this symposium. For purposes of analyzing the proposed Ohio law on homicide and bodily injury, references will be made to the various *mens rea* requirements only to define the gradations of the offenses and to focus on aberrational consequences. In addition, it is significant to note as this point that some defenses (e.g., duress) are specifically inapplicable to homicidal offenses.

¹³ Discussions of abortion and suicide will not be included in this comment. Early in its deliberation the Technical Committee that drafted the Proposed Code decided that abortion (PROP. OHIO CRIM. CODE § 2919.11) should be considered separately and that suicide should not be included in the context of criminal conduct. See The Technical Committee to Study Ohio Criminal Laws and Procedures, Draft No. 23-2 (June 19, 1967).

Since suicide is not an offense, complicity in a suicide is likewise non-criminal. See PROP. OHIO CRIM. CODE § 2923.03. The drafters of the Proposed Code felt that no public interest was served by criminalizing complicity to suicide even though there was common law support in Ohio for the proposition. See *Blackburn v. State*, 23 Ohio St. 146 (1872). But see MODEL PENAL CODE § 210.5 (Proposed Official Draft 1962) [hereinafter cited as M.P.C. (P.O.D.)]; M.P.C. § 201.5, Comment (Tent. Draft No. 9); N.Y. PENAL LAW § 120.30, .35 (McKinney 1967). See generally G. WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* (1957).

sent an enlargement of the punishment provided for basically similar offenses contained in the present Ohio law. This increase can be explained by either a retributive theory or a theory of marginal general deterrence. The relationship between retributive sanctions and the purpose of the law of homicide has already been explored, and the retributive theory has been rejected as inconsistent with that purpose. Although it is logical to assume that a greater sanction will have a greater impact on deterrence, available data in the area has suggested that increased penalties have little impact as an extra deterrent, even though legislators have placed great faith in such increases.¹⁴ Whether or not the increased sanction for the specific conduct is accomplished by lowering the *mens rea* requirement for a greater offense or by just raising the sanction imposed for the conduct under the present law is a secondary problem to the lack of any theoretical basis for this basic increase in the homicide sanctions.

II. CAPITAL MURDER AND MURDER¹⁵

A. *The Premeditation-Deliberation Formula*

Without any consideration of the mental element, criminal homicide is the killing of another that is not excused or justified.¹⁶ The English common law of criminal homicide distinguished between murder and manslaughter on the basis of malice aforethought—express if the killing was accompanied by an intent to kill or to do grievous bodily harm or implied if the nature of the killing evidenced a depraved indifference to life or if it accompanied the commission of a felony.¹⁷ This gradation of criminal homicides in England grew out of the ancient concept of benefit of clergy and was designed to mitigate the harshness of capital punishment.¹⁸ The distinguishing standard, malice aforethought, by definition included the idea that the killing was voluntary and without adequate provocation.

The English classification system was carried to the United States where it was significantly modified. The American permutation of the common law definition divided murder into two degrees in an attempt to limit the use of the death penalty, which was reserved for murder in the first degree, and distinguished between the two degrees on the basis of premeditation and deliberation.¹⁹ In addition first degree murder included a modi-

¹⁴ F. ZIMING, PERSPECTIVES ON DETERRENCE 89 (1971).

¹⁵ For a legislative history of the proposed sections on murder and capital murder, see APPENDIX I, *infra*.

¹⁶ Gegan, *Criminal Homicide in the Revised New York Penal Law*, 12 N.Y.L.F. 565 (1966) [hereinafter cited as Gegan].

¹⁷ See Byrn, *Homicide Under the Proposed New York Penal Law*, 33 FORD L. REV. 173, 175 (1964) [hereinafter cited as Byrn]; Wechsler and Michael, *supra* note 1, at 702-03; Wechsler, *supra* note 3, at 1445.

¹⁸ Danforth, *supra* note 5, at 148 n.4, 149.

¹⁹ See Wechsler and Michael, *supra* note 1, at 703-04; Wechsler, *supra* note 3, at 1445.

fied version of the common law idea of the felony-murder rule.²⁰ But the most important development in the law of murder in this country was the creation of the premeditation-deliberation formula.

Premeditation and deliberation in the law of murder was originally thought to require that the homicidal scheme was conceived and planned well in advance of the actual killing.²¹ However, judicial development of the premeditation-deliberation formula perverted the normal interpretation of the words until the formula was satisfied by a very short duration (that is, enough time for reflection).²² In effect the premeditation-deliberation formula was eliminated from the definition of first degree murder and that left only the requirement of a specific intent to kill and a privilege offered the jury to bestow mercy in particular cases.²³ Additionally, in some states the delineations between murder and manslaughter by way of the provocation formula and between the two degrees of murder by way of premeditation and deliberation have become mixed and confused.²⁴ This confusion has resulted in situations in which a homicide that was provoked but not sufficiently to classify it as manslaughter automatically became murder in the first degree because the seconds between the provocative conduct and the fatal act were thought to be enough to satisfy the requirements of premeditation and deliberation.²⁵ This conclusion seems to be antithetical to the original purpose of distinguishing between the two degrees of murder.

Ohio's present law on murder has followed the general American trend of dividing murder into two degrees. First degree murder thus contemplates a purposeful killing with "deliberate and premeditated malice" and a modified form of the felony-murder rule.²⁶ Consequently, second degree

The first state statute using two degrees of murder differentiated by the premeditation-deliberation formula was passed in Pennsylvania in 1794. This statute has been used as a model by many state penal codes in operation today. See, e.g., OHIO REV. CODE ANN. § 2901.01 (Page 1954). For an excellent study of the Pennsylvania Statute, see Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. PA. L. REV. 759 (1949).

²⁰ For a discussion of the felony-murder rule, see subpart 3, *infra*.

²¹ Wechsler and Michael, *supra* note 1, at 707; Gegan, *supra* note 16, at 567. See M.P.C. § 201.6 Comment (Tent. Draft No. 9).

²² See, e.g., *Commonwealth v. Drum* 58 Pa. 9 (1868); *Mackiewicz v. State*, 114 So. 2d 684 (Fla. 1959). Since there is no intent unless there is a choice, sudden impulse became the dividing line. Gegan, *supra* note 16, at 567-68.

²³ What we have is merely a privilege offered to the jury to find the lesser degree when the suddenness of intent, the vehemence of the passion, seem to call irresistably for the exercise of mercy. I have no objection to giving them this dispensing power, but it should be given to them directly and not in a mystifying cloud of words. The present distinction is so obscure that no jury hearing it for the first time can fairly be expected to assimilate and understand it.

B. CARDOZO, *LAW AND LITERATURE* 100 (1931).

²⁴ See Byrn, *supra* note 17, at 177.

²⁵ E.g., *Mackiewicz v. State*, 114 So. 2d 684 (Fla. 1959).

²⁶ OHIO REV. CODE ANN. § 2901.01 (Page 1954). Malice is generally inferred if a purpose to kill is established. See *State v. Stout*, 49 Ohio St. 270, 30 N.E. 437 (1892); *Weaver v. State*, 24 Ohio St. 584 (1874). See also 4 OHIO JURY INSTRUCTIONS—CRIMINAL § 409.25 (1971) [hereinafter cited as 4 O.J.I.—CRIMINAL].

murder includes all other homicides that are perpetrated "purposely and maliciously."²⁷ In addition, Ohio has construed its premeditation-deliberation formula to require no substantial planning in accordance with the general trend of the law in this country.²⁸

Although the proposed draft of the murder sections has discarded the nomenclature of the traditional division of murder into degrees, the proposed offenses of capital murder and murder have retained, with some modification, the essential characteristics of the present statutes.²⁹ Significantly, the Proposed Code distinguishes between capital murder and murder not only on the basis of some idea of premeditation but also on the basis of two different mental states. The proposed basic capital murder section (absent the felony-murder rule) retains the requirement of a purpose to kill; however, the proposal on murder requires only a "knowing" homicide. If the definitions of "purposely" and "knowingly" were similar to the ideas contained in the Model Penal Code, this change would have a small effect.³⁰ Thus, homicides not perpetrated with prior calculation and design but committed "purposely" would fall within the bounds of the proposed murder statute because under the Proposed Code purposeful conduct is also done "knowingly."³¹ This is the same result that would occur under the present law. On the other hand, a "knowing" homicide that is now classified as manslaughter would be accelerated in seriousness to murder. For example, if X is involved in an altercation with Y whom he knows to have a fragile skull and in the heat of the fight (without premeditation) throws a rock at Y which strikes his skull and kills him, under the present Ohio law X would be guilty of either murder in the second degree or manslaughter depending upon whether or not the jury believed that X intended death to result. Since the factual basis of X's purpose to kill is equivocal, the jury would have to find X guilty of manslaughter at the most. But if the proposed murder *mens rea* of "knowingly" is defined like the Model Penal Code (awareness of conduct that is practically certain to cause the proscribed result) X's

²⁷ OHIO REV. CODE ANN. § 2901.05 (Page 1954). All homicides that are not committed with a purpose to kill (excluding vehicular homicides) are either manslaughter or non-criminal.

²⁸ *State v. Shoemaker*, 12 Ohio 43 (1843); *State v. Stewart*, 176 Ohio St. 156, 198 N.E.2d 439 (1964); *State v. Schaffer*, 113 Ohio App. 125, 177 N.E.2d 534 (1960) (spur of the moment rule). But see *State v. Ross*, 92 Ohio App. 29, 108 N.E.2d 77, *appeal dismissed*, 158 Ohio St. 248, 108 N.E.2d 282 (1952); *Tolliver v. State*, 9 Ohio L. Abs. 488 (Ct. App. 1930) (error to instruct that premeditation can come into existence in a moment). *Contra*, *Bullock v. United States*, 122 F.2d 213 (D.C. Cir. 1941) (to speak of premeditation on the spur of the moment is a contradiction in terms).

²⁹ PROP. OHIO CRIM. CODE § 2903.01 (A) (capital murder):

No person shall purposely, and with prior calculation and design, cause the death of another.

PROP. OHIO CRIM. CODE § 2903.02 (A) (murder):

No person shall knowingly cause the death of another.

³⁰ See M.P.C. § 2.02(2)(a)-(b) (P.O.D.).

³¹ See PROP. OHIO CRIM. CODE § 2901.22(E).

conduct under the Proposed Code would probably be classified as murder because although the facts are equivocal as to X's specific intent, they firmly support X's awareness of the result of his conduct. Therefore, even if the jury were not foreclosed from finding manslaughter in X's situation, it would conclude on the facts with greater certainty that X "knowingly" killed even though it could not find a purpose to kill beyond a reasonable doubt. Since the basic capital murder provision in the Proposed Code still requires an element of premeditation, this effect would not expand the scope of capital punishment but would increase the penalty for a "knowing" homicide under the Proposed Code from a maximum sentence of four to ten years imprisonment³² to a sentence of 15 years to life imprisonment.³³

However, the draft of the proposed sections on culpable mental states presents a somewhat confusing array of definitions. Although the definition of "purposely" in the Proposed Code is almost identical to the Model Penal Code formulation,³⁴ the Proposed Code's definition of "knowingly" substantially deviates from the Model Penal Code and creates a material expansion of the scope of the proposed murder statute.³⁵ Whereas the Model Penal Code definition of "knowingly" involves an actor's awareness that his conduct is *practically certain* to cause a proscribable result, the Ohio proposal on "knowingly" focuses on the actor's awareness that his conduct is *likely* to cause a result. This difference in language seems to indicate that "knowingly" under the Ohio proposal requires a less culpable mental state than the Model Penal Code formulation. The effect of the distinction between *likely* and *practically certain* will be to include many homicides in the proposed murder provision that would otherwise be considered manslaughter. For example, if Q engages in an altercation with Z which results in Z's death because Q struck Z with his fist which caused Z to strike his head upon the ground, under a standard of "knowingly" that requires *practical certainty* Q would probably be found guilty of manslaughter or some lesser homicide because the factual basis of Q's mental state does not rise to the level to indicate that Q was practically certain when he landed his blow that he would cause a homicidal result. However, since the requirement of *likely* expands the range of factual situations encompassed by the proposed murder provision, a jury would probably find Q guilty of a "knowing" murder because it could conclude on the facts that Q was consciously aware that death was likely to result from his conduct. From a practical standpoint in the majority of murder cases, the jury will no longer be given

³² PROP. OHIO CRIM. CODE § 2929.04(B)(3).

³³ PROP. OHIO CRIM. CODE § 2929.01(B).

³⁴ Compare PROP. OHIO CRIM. CODE § 2901.22(A), with M.P.C. § 2.02 (2)(a)(P.O.D.).

³⁵ Compare PROP. OHIO CRIM. CODE § 2901.22(B), with M.P.C. § 2.02(2)(b)(P.O.D.). For an exposition of the present Ohio law on guilty knowledge, see 4 O.J.I.—CRIMINAL § 409.09.

the choice of manslaughter in a case warranting possibly no greater sanction.

Besides the alterations in the *mens rea* element by the Proposed Code, the most significant change in differentiating between murder and capital murder is the modification of the premeditation-deliberation formula. At the outset of their considerations, the drafters of the proposal on homicide realized that the Ohio case law had emasculated the distinction between first and second degree murder. Thus, their intention was to express disapproval of the Ohio case law by changing the wording of "deliberate and premeditated malice" to something like "substantial prior premeditation."³⁶ The present proposed language of "prior calculation and design" was intended to indicate that momentary deliberation may not be sufficient to constitute a studied scheme to kill and that capital murder is appropriate only if the means as well as the scheme of death is planned with studied care.³⁷

In evaluating the proposed Ohio premeditation-deliberation formula, critical analysis must be directed toward the vagaries of the language itself. There is no great body of case law in this country defining "prior calculation and design." Although the drafters of the proposal purport to eliminate present Ohio case law in the area, they do not suggest what substantive interpretation will take its place. Courts grappling with the problem will inquire into the origins of the premeditation-deliberation formula as a reference point. However, it is obvious that the proposed words do not exactly have the same meaning as the early definitions of premeditation and deliberation. Thus, a possible jury instruction that could give substance to the barebones of "prior calculation and design" would be:

To find that the defendant has killed with prior calculation and design, you [the jury] must find from all the facts and circumstances of the case that the defendant before causing the death of the victim estimated the probable consequences of his contemplated acts, thought about the end that he was seeking, and considered the means to achieve those ends. The time elapsed between the formulation of the design of death and the carrying out of that design must be long enough to give the defendant an opportunity to reflect on the consequences of his actions and plan the means to achieve those actions. A sudden impulse to kill is not sufficient to allow the substantial reflection that the law requires.³⁸

In addition to the language problem of the proposed formulation, though, is the question of the viability of the premeditation-deliberation

³⁶The Technical Committee to Study Ohio Criminal Laws and Procedures, Draft No. 23-1 (May 2, 1967). The language "substantial prior deliberation" was also tried before the Committee settled upon the present language. The Technical Committee to Study Ohio Criminal Laws and Procedures, Draft No. 23-3-B (April 21, 1970).

³⁷PROP. OHIO CRIM. CODE § 2901.01, Committee Comments at 71. The length of time that an offender takes to ponder the crime itself is still not a critical factor.

³⁸See Wechsler and Michael, *supra* note 1, at 734 n.139. For the present Ohio jury charge on deliberate and premeditated malice, see 4 O.J.I.—CRIMINAL § 457.01(c).

formula as sufficient criteria to distinguish murder from capital murder. Of course, the problem would become almost academic if capital punishment were abolished or limited within a sentencing statute for murder and not within the substantive definition of the offense itself.³⁹ Without capital punishment to motivate "mitigating" distinctions within the substantive law, a unitary concept of murder could be adopted. If capital punishment is to be retained, though, the premeditation-deliberation formula is an inadequate criterion to determine the imposition of the death penalty. The formula has been extensively criticized because it fails to properly separate murders in accordance with the recognized goals of the criminal law.⁴⁰ In juxtaposition to such criticism is the idea that offenders who reflect upon their criminal conduct are more readily deterred and less dangerous than actors who kill spontaneously. However, since most murders are crimes of passion or extreme depravity, the offenders who may be the most readily deterred may not be the most dangerous criminals in society. Thus, if the purpose of the law of homicide is to prevent harm to human life, the truly dangerous offender must also be criminalized and incapacitated.

A possible alternative to proposed sections on murder and capital murder could be developed from a modified form of the suggested statutes in the Model Penal Code⁴¹ or the Proposed Federal Criminal Code.⁴² This proposal would include a category of murder that proscribed conduct manifesting an extreme indifference to the value of life.⁴³ Nevertheless, a similar formulation was criticized by the Technical Committee because (1) it decreased the flexibility of the prosecution; (2) it would expand the scope of the death penalty; and (3) it would be contrary to the traditional Ohio law on murder which requires a specific intent to kill.⁴⁴ However, with a uni-

³⁹ See N.Y. PENAL LAW § 125.25 (McKinney 1967); M.P.C. § 210.2 (P.O.D.). The National Commission on Reform of Federal Criminal Laws, Final Report: A PROPOSED NEW FEDERAL CRIMINAL CODE—TITLE 18 at § 1601 (1970) [hereinafter cited as PROP. FED. CRIM. CODE].

⁴⁰ "As much cruelty, as much indifference to the life of others, a disposition at least as dangerous to society, probably even more dangerous, is shown by sudden as by premeditated murders."

3 J. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 94 (1883). See M.P.C. § 201.6, Comment at 68-71 (Tent. Draft No. 9); PROP. FED. CRIM. CODE § 1601, Comments; The President's Commission on Law Enforcement and Administration of Justice, TASK FORCE REPORT: THE COURTS 97 (1967) [hereinafter cited as TASK FORCE REPORT: THE COURTS]; Danforth, *supra* note 5, at 151; Gegan, *supra* note 16, at 567; Wechsler, *supra* note 3, at 1446.

⁴¹ M.P.C. § 210.1-2 (P.O.D.). The history of the Proposed Code reveals that a scheme like the Model Penal Code's homicide provisions was submitted to the Technical Committee and was rejected. See the Technical Committee to Study Ohio Criminal Laws and Procedures, Draft No. 23 (Apr. 17, 1967).

⁴² PROP. FED. CRIM. CODE § 1601.

⁴³ The English common law contained a similar murder formulation. See Wechsler and Michael, *supra* note 1, at 703.

⁴⁴ See The Technical Committee to Study Ohio Criminal Laws and Criminal Procedures, Draft No. 23 (Apr. 17, 1967). Other criticisms of the Model Penal Code murder proposals have been that it is too vague; that it adds an additional *mens rea* category; and

tary murder concept, prosecutorial flexibility actually would be enhanced by the additional category. Furthermore, the problem of the death penalty would disappear if it were abolished or if the criteria for the imposition of capital punishment were removed from the substantive sections and placed within sensible and adequate sentencing provisions. Since a specific intent to kill is no longer required in all capital murder cases,⁴⁵ the consistency of the present law does not seem to mandate a requirement of a purpose to kill in future murder formulations. Therefore, the reluctance to thoroughly revise the Ohio law of murder would seem to be a concession to history and tradition and not a defensible theoretical position.

The present proposal on the premeditation-deliberation distinction between capital murder and murder takes Ohio law back approximately to the original meaning that was intended by the formula. However, it does not take into account the recent critical developments in the area. Measuring the proposal against the purported goals of the criminal law, the proposal still places too much emphasis on the retributive aspect of sanctions without furthering the purpose of preventing undesirable harm.

B. *Special Provisions on Capital Murder.*

Within the present Ohio law on capital murder certain provisions on special homicides which do not require premeditation and which are not part of the felony-murder rule are included. During the history of the Ohio Revised Code, certain special interest groups and other external motivations have influenced the General Assembly to enact murder statutes with specific references to particular conduct. The effect of these statutes is to accelerate a homicide to capital status that might otherwise be non-capital because it was not perpetrated with premeditation and deliberation or in connection with a felony. For example, under the present law capital murder (*i.e.*, murder that requires the imposition of capital punishment unless mercy is recommended) includes the killing of a guard by a convict,⁴⁶ the killing of a law enforcement officer in the discharge of his duties,⁴⁷ and the killing of another which is caused by the malicious obstruction of a railroad.⁴⁸ With one exception, all of these special capital murder provisions

that the idea of reckless indifference is covered by the Ohio definition of "knowingly." The first two objections do not seem to be well-founded because there is presently a developed body of case law on the interpretation of *mens rea* categories, like the Model Penal Code, in Illinois and New York. Furthermore, the proposed Ohio definition of "knowingly" is a confusing permutation of the Model Penal Code definition and appears to cover the Model Penal Code's concept of recklessly as well knowingly. See PROP. OHIO CRIM. CODE § 2901.22(B).

⁴⁵ See PROP. OHIO CRIM. CODE § 2901.01(C) (felony-murder rule).

⁴⁶ OHIO REV. CODE ANN. § 2901.03 (Page 1954). It is somewhat unclear whether this offense requires a specific intent to kill. See *Baus v. Alvis*, 74 Ohio L. Abs. 195, 140 N.E.2d 93 (C.P. 1956).

⁴⁷ OHIO REV. CODE ANN. § 2901.04 (Page 1954).

⁴⁸ OHIO REV. CODE ANN. § 2901.02 (Page 1954). In addition Ohio's "Little Lindberg Law" requires a death sentence if an abducted person dies due to injury, threat, exposure,

are eliminated by the Proposed Code and are replaced with the more uniform definitions of the proposed murder and capital murder provisions.⁴⁹

The single exception in the original proposal to the uniformity of the capital murder definition referred to a death which was committed purposely and by means of a concealed weapon or dangerous ordnance.⁵⁰ This provision was rationalized by the Technical Committee on the ground that some individuals psychologically were "conditioned to kill" and in a practical sense murdered their victims with prior calculation and design.⁵¹ However, since the problem was serious and it would be difficult to prove the advance planning necessary for capital murder, special treatment was thought to be warranted. Realistically, the original provision made little sense. Besides having a doubtful psychological foundation, the proposed version's acceleration of a spontaneous homicide to capital murder lacked rationality. Thus, the imposition of the death penalty seemed to turn solely on the factor of concealment. If the offender had the weapon openly in his possession, the resulting purposeful homicide without prior calculation and design would be murder. The Technical Committee, therefore, seemed to create a conclusive presumption of prior calculation and design from the fact of concealment. Furthermore, the provision was an open admission that the premeditation-deliberation formula failed to discriminate adequately between the two grades of murder.⁵² Whatever deterrence value the proposed subsection had seemed to be directed more toward the charge of carrying a concealed weapon than the homicide. For these reasons and others, it was wise for the legislature to lay the proposal to rest.

However, the amended subsection proscribing the purposeful killing of another knowing him to be a law enforcement officer in the performance of his duties represents a return to a capital murder provision for a special interest group.⁵³ A similar subsection was considered by the Technical Commit-

or neglect. OHIO REV. CODE ANN. § 2901.28 (Page 1954). For Ohio homicide provisions requiring a mandatory death sentence, see OHIO REV. CODE ANN. § 2901.09 (Page 1954) (willfully and maliciously killing the president, vice-president, or other person in the line of succession); OHIO REV. CODE ANN. § 2901.10 (Page 1954) (willful and malicious killing of the governor or lieutenant governor).

⁴⁹ Many of the factual situations contained in the present special murder statutes have been included as criteria favoring the imposition of the death penalty in the amended proposal on capital sentencing. See PROP. OHIO CRIM. CODE § 2929.03(B) (as amended in SUBSTITUTE HOUSE BILL NUMBER 511 [hereinafter cited as SUB. H.B. 511]). Outside the proposed law on homicide, the death penalty is retained for the amended version or the proposed kidnapping for hire offense. PROP. OHIO CRIM. CODE § 2905.01(A)(1) (as amended in SUB. H.B. 511).

⁵⁰ PROP. OHIO CRIM. CODE § 2903.01(B):

No person shall purposely cause the death of another by means of a firearm or dangerous ordnance carried in violation of Section 2923.12 of the Revised Code.

⁵¹ PROP. OHIO CRIM. CODE § 2903.01, Committee Comments at 71.

⁵² The original proposal suggested standards similar to the ones contained in the Model Penal Code formulation of a homicide "evidencing extreme indifference to the value of human life" which was rejected by the Technical Committee. See M.P.C. § 210.2(1)(b) (P.O.D.).

⁵³ PROP. OHIO CRIM. CODE § 2903.01(B) (as amended in SUB. H.B. 511):

tee and was rejected because the Committee believed that law enforcement officers were adequately protected by the capital murder provision and the proposed criteria for the imposition of capital punishment.⁵⁴ Of course, the basic effect of the amended proposal is to accelerate a homicide that would otherwise be murder to capital murder without the requirement of prior calculation and design. Since the amended subsection has retributive overtones and does not significantly add to the deterrence of murders of law enforcement officers, which are usually well-planned, it would be better to delete the amended proposal from the enacted statute.

C. *The Felony-Murder Rule*

The felony-murder rule originated at a time in the history of the English common law when capital punishment was the penalty for all felonies. Therefore, it made little difference whether the offender was executed for the homicide or the underlying felony.⁵⁵ However, as the severity of sentences for felonies was reduced, the felony-murder rule endured and became a fictional concept that transferred the mental element of the underlying felony to the *mens rea* requirement of murder.⁵⁶ Thus, capital punishment for homicide was inflicted without regard to the actor's mental state concerning the homicide. Intentional, reckless, and accidental homicides during a felony were swept up in the scope of the rule.

Several mutations of the common law rule were developed in this country as well as England to mitigate its harsh operation and were utilized in the rule's modern formulations. These variations either listed specific felonies (usually violent) that triggered the operation of the rule⁵⁷ or just referred to those felonies that by their nature involved a risk of death.⁵⁸

No person shall purposely cause the death of another whom he knows is a law enforcement officer performing his duties in protecting persons or property, preventing or detecting crime, apprehending or detaining offenders, or otherwise enforcing the law.

⁵⁴ PROP. OHIO CRIM. CODE § 2903.01, Committee Comments at 71-72.

⁵⁵ R. PERKINS, CRIMINAL LAW 44 (1969). Blackstone was one of the first English judicial scholars to verbalize the rule: "[I]f one intends to do another felony, and undesignedly kills a man, this is also murder." 4 W. BLACKSTONE, COMMENTARIES 200 (1818). For a history of the rule, see The Report of the Royal Commission on Capital Punishment, U.K. CMD. NO. 8932, at 77-90, Appendix 7(b)(1953); Prevezer, *The English Homicide Act: A New Attempt to Revise the Law of Murder*, 57 COLUM. L. REV. 624, 634 (1957) [hereinafter cited as Prevezer].

⁵⁶ Gegan, *supra* note 16, at 586. This requirement of *malum prohibitum* was the essence of the common law felony murder rule. See Morris, *The Felon's Responsibility For the Lethal Acts of Others*, 105 U. PA. L. REV. 50, 59 (1956).

⁵⁷ See, e.g., PA. STAT. ANN. § 4701 (Purdon 1963).

⁵⁸ See *People v. Pavlic*, 227 Mich. 562, 199 N.W. 373 (1924); *State v. Diebold*, 152 Wash. 68, 277 P. 394 (1929). In England, Stephen, J. in *Regina v. Serne*, 16 Cox Crim. Cas. 311 (1887), attempted to abrogate the rule by judicial fiat. In *Serne* the court focused on the defendant's conduct rather than the inherent nature of the felony. The case narrowly limited the scope of the rule and approached the modern "reckless depravity" definition of murder. Although the case was frequently distinguished after Stephen's time, the felony-

Other recent formulations of the felony-murder rule have attempted to alleviate its harshness by creating a rebuttable presumption of "reckless indifference" if the homicide were committed during the perpetration of specified felonies⁵⁹ or by designing a limited affirmative defense for a participant in the underlying felony who did not cause the death.⁶⁰ Significantly, these changes have had varying effects upon the application of capital punishment due to the differences in the definitions of capital murder in the several jurisdictions.⁶¹

The development of the felony-murder doctrine in Ohio has been unique. Although the statute typically listed specific felonies that triggered the operation of the rule, the Supreme Court of Ohio in *Robbins v. State*⁶² interpreted the language to require a purposeful homicide. Thus, to complete the offense of felony-murder in Ohio, a defendant is required to commit the homicide with a specific intent to kill instead of having the *mens rea* requirement of first degree murder supplied by the mental element of the underlying felony.⁶³ The underlying felony then functions only to supply the requisite premeditated and deliberate malice for first degree murder.⁶⁴ Therefore, since the present Ohio second degree murder statute requires a purposeful killing,⁶⁵ a homicide committed during the perpetration of one of the listed felonies can only be first degree murder or manslaughter. This narrow statutory interpretation has existed for over one hundred years

murder rule (constructive murder) in England was eventually abolished. The English Homicide Act of 1957, 5 & 6 Eliz. 2, c.11, § 1.

⁵⁹ M.P.C. § 210.2(1)(b) (P.O.D.). In Wisconsin, a jurisdiction which has abolished capital punishment, a homicide which is the natural and probable consequence of a felony is classified as third-degree murder, punishable by fifteen years imprisonment in excess of the maximum provided for the felony. WIS. STAT. ANN. § 940.03 (West 1958).

⁶⁰ N.Y. PENAL LAW § 125.25(3) (McKinney 1967); PROP. FED. CRIM. CODE § 1601(c). Generally, in the practical application of the common law felony-murder rule or its modern variations, the accomplice in the felony is punished as if he were the principle even though the accomplice is not at the scene of the felony. See Byrn, *supra* note 17, at 195.

⁶¹ For example, if a jurisdiction which required a specific intent to kill coupled with the common law felony-murder rule were to change its rule to include only specified felonies and a reckless mental state for the homicide, the application of capital punishment would be substantially decreased. On the other hand, if a jurisdiction which required a reckless mental state for capital murder coupled with the common law rule were to change its rule to include specified felonies and the requirement of reckless mental state for the homicide, the effect upon the imposition of the death penalty would be less severe.

⁶² 8 Ohio St. 131 (1857).

⁶³ See *Turk v. State*, 48 Ohio App. 489, 194 N.E. 425 (1934), *aff'd per curiam by an equally divided court*, 129 Ohio St. 245, 194 N.E. 453 (1935); *State v. Farmer*, 156 Ohio St. 214, 102 N.E.2d 11 (1951). But see *State v. Salter*, 149 Ohio St. 264, 78 N.E.2d 575 (1948).

⁶⁴ *Lindsay v. State*, 69 Ohio St. 215, 232, 69 N.E. 126, 131 (1903). For an excellent historical study of the Ohio felony-murder rule, see Note, *The Felony-Murder Rule in Ohio*, 17 OHIO ST. L.J. 130 (1956). Under the present Ohio law, a purposeful killing by means of poison does not require deliberate and premeditated malice to be first degree murder. OHIO REV. CODE ANN. § 2901.01 (Page 1954). This provision is not included in the proposed murder sections.

⁶⁵ OHIO REV. CODE ANN. § 2901.05 (Page 1954).

and has survived several codifications and revisions without substantial change.⁶⁶

Although the modern trend of criminal law revision is to limit the operation of the felony-murder doctrine or even to abolish it,⁶⁷ the proposed Ohio rule expands the scope of the present statute. Besides adding the new offense of escape to the existing list of robbery, burglary, kidnapping and rape,⁶⁸ the drafters of the Proposed Code have eliminated the requirement of a specific intent to kill and replaced it with a "reckless" *mens rea*.⁶⁹ Like the present Ohio law, though, the underlying felony supplies the premeditation-deliberation requirement for capital murder. The drafting history of the Proposed Code suggests that at one time in the Technical Committee's deliberation thought was given to eliminating the Ohio felony-murder rule due to its insignificance in a legislative scheme that would not use the premeditation-deliberation formula and would apply the felony-murder theory in the sentencing provisions.⁷⁰ But the Technical Committee in the final draft believed that a requirement of "purposely" impermissibly narrowed the scope of the felony-murder rule and that a reckless mental state, and conscious disregard of a substantial homicidal risk, would be appropriate.⁷¹ The importance of this change cannot be underestimated. Whatever the final definition of "recklessly" becomes, the lowering of the *mens rea* requirement for felony-murder will multiply the instances in which the death penalty may be imposed. The criteria that is contained in the original pro-

⁶⁶ In addition to the general Ohio felony-murder rule, the death of a kidnap victim also is capital murder. OHIO REV. CODE ANN. § 2901.28 (Page 1954). This provision is retained in the amended Proposed Code. PROP. OHIO CRIM. CODE § 2905.01(A)(1) (as amended in SUB. H.B. 511).

⁶⁷ M.P.C. § 201.2, Comment at 33-39 (Tent. Draft No. 9).

⁶⁸ See PROP. OHIO CRIM. CODE § 2921.34. Changes in the present law concerning the listed felonies by the Proposed Code will not be explored at this time. It is sufficient to note that the application of the felony-murder doctrine may be somewhat expanded because the proposed list of felonies includes both the aggravated offense and the offense itself.

⁶⁹ PROP. OHIO CRIM. CODE § 2903.01(C) (as amended in SUB. H.B. 511) reads as follows:

No person shall recklessly cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

SUB. H.B. 511 added the words "or while fleeing immediately after committing or attempting to commit" to the original provision. Apparently, the addition is a codification of present Ohio law on felony-murder. See *State v. Habig*, 106 Ohio St. 151, 140 N.E. 195 (1922). (a killing in perpetration of a robbery includes a death caused by the robber a few minutes after the offense and a short distance from its commission). It is similar to the rule in the recent New York revision and is probably designed to eliminate some of the technical issues concerning the completion of the underlying felony at the time of the killing. N.Y. PENAL LAW § 125.25(3) (Practice Commentary); accord, PROP. FED. CRIM. CODE § 1601(c). However, even with the specific inclusion of this provision, there is still the defense of abandonment to the charge of felony-murder in New York. See *People v. Jackson*, 20 N.Y.2d 440, 23 N.E.2d 722, 285 N.Y.S.2d 8 (1967).

⁷⁰ The Technical Committee to Study Ohio Criminal Laws and Criminal Procedures, Draft No. 23, Comments at 7, 10 (Apr. 17, 1967).

⁷¹ PROP. OHIO CRIM. CODE § 2903.01, Committee Comments at 71.

posal to guide the jury's discretion in the imposition of capital punishment point to several factors intimately connected with a felony-murder situation.⁷² Therefore, in the realm of homicide offenses to which capital murder is applicable, felony-murders are uniquely susceptible to the imposition of the death penalty under the Proposed Code. Instead of questioning the narrowness of the present felony-murder rule, the drafters of the original proposal should have inquired into the efficacy of increasing the penalties for felony-homicide that would only be manslaughter under the present law. If the Technical Committee had looked into the problem, it would have found that increases in legislatively provided penalties for major crimes have little impact as a marginal general deterrent.⁷³ Therefore, the efficacy of the decreased *mens rea* may not aid in the prevention of undesirable homicidal harm.

However, the true impact of this *mens rea* alteration is uncertain. This ambiguity is a product of the definition of "recklessly" that the Proposed Code adopts. The original version of the "recklessly" provision was very similar to the Model Penal Code formulation and required a conscious and unjustifiable disregard that the actor's conduct may cause a certain result.⁷⁴ However, the amended version of the definition of "recklessly" inserts the language of "heedless indifference" in the place of "conscious and unjustifiable."⁷⁵ The difficulty is whether "recklessly" as amended requires a conscious disregard of the homicidal risk or whether it refers to a subjective negligence standard like carelessness (that is, unaware of the consequences and no desire to find out). If the latter version is the proper meaning, the proposed felony-murder rule would encompass many homicides not intended to be added to the rule by the original drafters.⁷⁶

⁷² See PROP. OHIO CRIM. CODE § 2929.03(B)(3) (offense committed for purpose of gain); PROP. OHIO CRIM. CODE § 2929.03(B)(4) (offense committed in order to escape apprehension or punishment for another offense).

⁷³ F. ZIMING, PERSPECTIVES ON DETERRENCE 89 (1971). Although any interpolation from the FBI statistics is difficult, the conclusion that lowering the *mens rea* requirements for felony-murder in Ohio may not add to the security of life is supported by the fact that in 1970 Ohio's murder rate per 100,000 inhabitants was 6.6; whereas New York in which the felony-murder rule does not require a purpose to kill was 7.9. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS—1970, at 78.

⁷⁴ Compare PROP. OHIO CRIM. CODE § 2901.22 (C), with M.P.C. § 2.02(2) (c) (P.O.D.). Substantially, the provisions are the same except that the Model Penal Code spells out the standard as a "gross deviation" from a law-abiding person's standard of conduct. In addition, the Proposed Code's use of the phrase "may cause" instead of the Model Penal Code's formulation of "will result" seems to expand the scope of the proposed subsection.

⁷⁵ PROP. OHIO CRIM. CODE § 2901.22(C) (as amended in SUB. H.B. 511):

A person acts recklessly when with heedless indifference to the consequences he disregards a substantial risk that his conduct may cause a certain result or may be of a certain nature. A person is reckless with respect to circumstances when with heedless indifference to the consequences he disregards a substantial risk that such circumstances may exist.

⁷⁶ PROP. OHIO CRIM. CODE § 2903.01, Committee Comments at 71. The Technical Committee premised its expansion of the Ohio felony-murder rule on the idea that "recklessly" would mean a conscious disregard of a substantial homicidal risk. However, in another

For example, if *A* goes into a store to rob it and the owner of the store dies of a heart attack, *A* may be guilty of felony-murder because *A* acted carelessly to the risk of death in the robbery.⁷⁷ Putting the causation problem to one side, a different result might be reached if the reckless mental state required a conscious and unjustifiable disregard of the homicidal risk. Under the present Ohio law requiring a specific intent to kill, however, this incident would not fall within the ambit of felony-murder. Similarly, if *X*, a rapist, drives his car carelessly and has an accident causing the death of his rape victim, *X* would be, by definition, guilty of felony-murder under the amended proposal. However, if "recklessly" required a conscious and unjustifiable disregard of the risk, a homicide caused by careless driving immediately following the rape would be only some form of vehicular homicide under the proposed code. Certainly, the present Ohio rule would be inapplicable to accidental homicides. As these examples illustrate, the changes that are suggested by the proposed felony-murder rule seem to multiply the application of the doctrine and to be contradictory to whatever lingering rationale that a felony-murder rule has in a modern criminal code.

The classic formulation of the felony-murder doctrine allowing the imputation of the mental state for murder from the *mens rea* of the underlying felony has been attacked frequently and consistently because it does not contribute to the prevention of criminal homicides.

section the Committee suggests that their idea of conscious disregard includes the idea of heedless indifference. See PROP. OHIO CRIM. CODE § 2903.05, Committee Comments at 76.

⁷⁷ There are actually two separate issues involved in this example. One concerns the requisite *mens rea* for the operation of the rule. The other deals with the problem of proximate causation. In the application of the felony-murder rule, Ohio courts have never faced difficult causation questions because a specific intent to kill requires the consequences of a voluntary act to be natural, reasonable and probable. See *State v. Farmer*, 156 Ohio St. 214, 102 N.E.2d 11 (1951). Briefly, when there is a requirement of a specific intent, the application of the "cause in fact" test is narrowed to only those situations evidencing that intent. However, when the *mens rea* is changed to "recklessly," the scope of possible applications of the rule is expanded due to the enlarged realm of possible conduct that may satisfy the cause in fact test. Thus, problems of proximate causation vis-à-vis the application of the felony-murder rule have troubled courts in jurisdictions that have not required a specific intent to kill. Generally, such states have refused to apply the felony-murder rule when the killing was not attributable to the felony or to the volitional act of the felon. See *People v. Wood*, 8 N.Y.2d 48, 167 N.E.2d 736, 201 N.Y.S.2d 328 (1960); *People v. Gilbert*, 63 Cal. 2d 690, 408 P.2d 365, 47 Cal. Rptr. 909 (1965); *Commonwealth ex rel. Smith v. Myers*, 438 Pa. 218, 261 A.2d 550 (1970); *People v. Austin*, 370 Mich. 12, 120 N.W.2d 766 (1963). But see *Taylor v. Superior Court*, 3 Cal. 3d 578, 477 P.2d 131, 91 Cal. Rptr. 275 (1970) (no application of the felony-murder rule but violation of the California murder statute). The felony-murder rule would be perverted if the act of killing were also imputed. See *Morris*, *supra* note 56, at 68. However, jurisdictions that have rejected an expanded notion of proximate causation in their felony-murder rule have found no problem in applying it to situations where the death may not have been the natural and probable consequence of the felony. See *People v. Stamp*, 2 Cal. App. 3d 203, 82 Cal. Rptr. 593, *cert. denied*, 400 U.S. 819 (1969) (where the victim of a robbery died of a heart attack; *held* the felony-murder rule only requires the death to be a direct causal result of the felony regardless whether the death is the potential and probable consequence thereof).

To punish, as a murderer, every man who, while committing a heinous offence, causes death by pure misadventure, is a course which evidently adds nothing to the security of human life. . . . The only good effect which such punishment can produce will be to deter people from committing any of these offences which turn into murders what are in themselves mere accidents. . . . [I]t has never occurred to [a thief], nor would it occur to any rational man, that [he is] guilty of an offence which endangers life. . . . If the punishment for stealing from the person be too light, let it be increased, and let the increase fall alike on all the offenders. . . . The more nearly the amount of punishment can be reduced to a certainty the better. . . . [Hence,] the involuntary causing of death by rashness or negligence, though always punishable, ought under no circumstances to be punished as murder.⁷⁸

Additionally, criticism has been leveled at the rule because it erodes the essential nexus between the actor's mental state and the culpability of his conduct which results in an indiscriminate application of its sanction.⁷⁹

Although it is difficult to discover a principled argument in defense of the common law felony-murder rule, the generally accepted rationale has been that the criminal law should attempt to deter conduct that carries a high likelihood of causing death.⁸⁰ Thus, Justice Holmes explained that:

[I]f experience shows, or is deemed by the law-maker to show, that somehow or other deaths which the evidence makes accidental happen disproportionately often in connection with other felonies, or with resistance to officers, or if on any other ground of policy it is deemed desirable to make special efforts for the prevention of such deaths, the law-maker may consistently treat acts which, under the known circumstances, are felonious, or constitute resistance to officers, as having a sufficiently dangerous tendency to be put under a special ban. The law may, therefore, throw on the actor the peril, not only of the consequences foreseen by him, but also of consequences which, although not predicted by common experience, the legislator apprehends.⁸¹

However, such justification has been rejected as having no basis in common experience.⁸² Furthermore, any retributive rationale for the felony-murder doctrine should be closely scrutinized in light of the other goals of criminal sanctions and of community sentiment regarding the harm.⁸³

⁷⁸ COMMISSIONERS ON CRIMINAL LAW, SECOND REPORT 17 (1846), quoted in 1 W. RUSSELL, CRIME 563 (10th ed. 1950).

⁷⁹ Packer, *The Model Penal Code and Beyond*, 63 COLUM. L. REV. 594, 598 (1963); Hooper, *Some Anomalies and Development in the Law of Homicide*, 3 U.B.C.L. REV. 55, 76 (1967); Morris, *supra* note 56, at 60; Gegan, *supra* note 16, at 586-87; Byrn, *supra* note 17, at 199; Note, 22 STAN. L. REV. 1059, 1060 (1970). For Stephen's early attack on the felony-murder rule as cruel and monstrous, see 3 J. STEPHEN, HISTORY OF CRIMINAL LAW OF ENGLAND 57-75 (1883).

⁸⁰ Symposium, *New York's Penal Law*, 18 BUFF. L. REV. 211 (1969); Morris, *supra* note 56, at 67-68; Note, 22 STAN. L. REV. 1015, 1069 (1970).

⁸¹ O. HOLMES, THE COMMON LAW 59 (1881).

⁸² M.P.C. § 201.2, Comment at 38 (Tent. Draft No. 9).

⁸³ Morris, *supra* note 56, at 68.

When an intentional or reckless mental state with regard to the homicide is used in a felony-murder rule instead of the common law formulation, a strong case can be made for a deterrence justification because the rule will focus on the homicidal behavior and not on the felonious conduct.⁸⁴ The present Ohio law has operated on such an assumption, as has the Model Penal Code, which uses the felony-murder rule as a presumption of a reckless homicide evidencing extreme indifference to the value of life.⁸⁵ Although the proposed Ohio felony-murder rule's original idea of reckless homicide fits within this rationale, the amended definition of "recklessly" brings the entire rule closer to the discredited common law formulation which criminalized accidental homicide.⁸⁶ Furthermore, even the original version of "recklessly" was an anomaly in the classic Ohio theory on the parameters of capital murder. Historically, Ohio has viewed capital punishment as only appropriate in cases that the perpetrator evidenced a purpose to kill. Such conduct and mental state was thought to be not the most deserving of the ultimate sanction but also the most susceptible to the deterrence qualities of the death penalty. The drafters of the Proposed Code, in keeping with the traditional Ohio policy, rejected the Model Penal Code's concept of "reckless" murder. Nevertheless, they purported inconsistently to broaden the stance of the felony-murder rule.⁸⁷ Such a change will not add much to the security of life in Ohio and will probably lead to seemingly harsh and inequitable results.

Practically, if the present Ohio rule requiring a specific intent to kill were retained in the proposed formulation, its importance would be enhanced by the modification of the premeditation-deliberation formula. Furthermore, certain homicides occurring during the perpetration of a listed felony that would be manslaughter under the present Ohio law would be included in the proposed murder provision.⁸⁸ Thus, it would be logically consistent with the Ohio theory on capital murder as well as sensible in terms of forwarding the goals of the criminal law and the sanctity of life in Ohio to require a specific intent to kill in the proposed Ohio felony-murder rule.

⁸⁴ Wechsler, *supra* note 3, at 1446.

⁸⁵ M.P.C. § 210.2(1)(b) (P.O.D.); *accord*, PROP. FED. CRIM. CODE § 1601(c).

⁸⁶ Homicides that are unexpected should be manslaughter. R. PERKINS, CRIMINAL LAW 44 (1969); Morris, *supra* note 56, at 68.

⁸⁷ The case for a "reckless" felony-murder rule is that an actor who engages in a felony of violence is recklessly endangering the lives of others even though there is no intent to kill. Wechsler, *supra* note 3, at 1446. This position is patently contradictory to the Ohio policy that the ultimate sanction is appropriate only if there is a "purpose to kill."

⁸⁸ If a reckless homicide committed during the perpetration of a listed felony requires a greater sanction than manslaughter, a possible innovation in the Proposed Code would be to place the proposed reckless felony-murder rule within the proposed murder section, while retaining the present Ohio rule in the capital murder provision. This formulation would be consistent with the code's theory on the gradation of aggravated offenses. Compare PROP. OHIO CRIM. CODE § 2903.11, with PROP. OHIO CRIM. CODE § 2903.12-13.

Whatever the final formulation of the *mens rea* requirement, consideration in the code should be given to the implications of the felony-murder rule. Much criticism of the felony-murder rule directed at its severe and harsh applications involves the liabilities of accomplices — the driver of an escape vehicle, a lookout, etc. — who share only the common felonious design with the actual murderer and who is unaware of any potential for homicide. If criminal punishment is to be administered on the basis of an individual's mental state and actions, accomplice liability as fully applied to the felony-murder does not seem consistent. Recent felony-murder rule proposals have attempted to expiate the harshness of accomplice liability by allowing a felon who did not participate in the homicidal act to assert an affirmative defense to the murder charge.⁸⁹

Under present Ohio law an accomplice to a felony is presumed to acquiesce in whatever may be reasonably necessary to accomplish the felony; and if it might be reasonably expected that the victim's life would be endangered, then the accomplice is liable for the homicide whether or not he was aware of the weapon used to perpetrate the homicide.⁹⁰ The proposed section on accomplice liability would not significantly change this rule.⁹¹ The drafting history indicates that no special consideration has been given to the accomplice liability problem. However, if the application of the felony-murder is to be expanded, some thought should be given to the inclusion of an affirmative defense provision in the Proposed Code to ameliorate the harshness of the rule on accomplices and at the same time retain concern for the value of life. A sample statute is set out below:

In the case of the prosecution of a crime under this subsection in which the defendant was not the only participant to the underlying felony, it is an affirmative defense that the defendant:

(a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and

(b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

(c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

(d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.⁹²

⁸⁹ See N.Y. PENAL LAW § 125.25(3) (McKinney 1967); PROP. FED. CRIM. CODE § 1601(c).

⁹⁰ State v. Palfy, 11 Ohio App. 2d 142, 229 N.E.2d 76 (1967).

⁹¹ PROP. OHIO CRIM. CODE § 2923.03.

⁹² See N.Y. PENAL LAW § 125.25(3) (McKinney 1967).

D. *Capital Punishment*⁹³

The aura of the death penalty pervades the grading system of criminal homicides. Its impetus has created statutory distinctions to avert its imposition. In England it has been abolished. In this country it has lingered into the twentieth century as a kind of brutal vestige of our medieval heritage. The most salient characteristic of capital punishment is its infrequent use.⁹⁴ In some states like Wisconsin, it has been abolished; while in others, like Delaware, it has been reenacted after a period of abolition.⁹⁵ Wherever capital punishment has been retained, controversy has surrounded its continued existence. It has been attacked on a variety of moral, socio-economic, and judicial grounds.⁹⁶ Moreover, the sensationalism and emotionalism surrounding capital punishment have an undesirable impact upon the administration of criminal justice.⁹⁷ In the face of this mounting criticism, however, the death penalty endures, and even though there has not been an execution in the United States since 1967, individuals are still sentenced to death, sometimes with increasing frequency.⁹⁸

Recently, capital punishment or the mode of its imposition has been attacked on a series of different constitutional grounds. First, in *Witherspoon v. Illinois*,⁹⁹ the United States Supreme Court held that a state could not exclude prospective jurors in a case where the possible punishment was death simply because the jurors had scruples about the imposition of the

⁹³ For a legislative history of the provisions on capital punishment in the Ohio House of Representatives, see APPENDIX II, *infra*.

⁹⁴ TASK FORCE REPORT: THE COURTS 27 (1967).

⁹⁵ See Samuelson, *Why Was Capital Punishment Restored in Delaware?*, 60 J. CRIM. L.C. & P.S. 148 (1969). Mr. Samuelson suggests that the death penalty was reinstated because of four brutal and well publicized murders in southern Delaware.

⁹⁶ For an excellent short synopsis of the arguments for and against capital punishment, see The National Commission on Reform of Federal Criminal Laws, FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 310-11 (1971) (Introductory Comment to Chapter 36). The classic work on the deterrence aspects of the death penalty is T. SELLIN, THE DEATH PENALTY (1959). Other articles expositing arguments against the retention of capital punishment include: H. BEDAU, THE DEATH PENALTY IN AMERICA 166-231 (1967); T. SELLIN, CAPITAL PUNISHMENT (1967); DiSalle, *Comment on Capital Punishment and Clemency*, 25 OHIO ST. L.J. 71 (1964); Hockkamier, *The Capital Punishment Controversy*, 60 J. CRIM. L.C. & P.S. 360 (1969); Reckless, *The Use of the Death Penalty*, 1969 CRIME & DEL. 43. Articles arguing for retention include: H. BEDAU, THE DEATH PENALTY IN AMERICA 120-165 (1967); Gerstein, *A Prosecutor Looks at Capital Punishment*, 51 J. CRIM. L.C. & P.S. 252 (1961); Van Den Hoag, *On Deterrence and the Death Penalty*, 60 J. CRIM. L.C. & P.S. 141 (1969) (the uncertainty of the deterrent effect favors its retention because lives of future victims might be saved by imposing it); Note, *In Defense of Capital Punishment*, 54 KY. L. J. 742 (1966). For an excellent article on the death penalty in Ohio, see Herman, *An Acerbic Look at the Death Penalty in Ohio*, 15 WEST. RES. L. REV. 512 (1964).

⁹⁷ TASK FORCE REPORT: THE COURTS 27. See M.P.C. § 201.6, Comment at 64 (Tent. Draft No. 9).

⁹⁸ In Ohio the imposition of the sentence of death in first degree murder cases rose from five in 1966 to 10 in 1968. See Ohio Judicial Criminal Statistics of the Department of Mental Hygiene and Corrections of the State of Ohio.

⁹⁹ 391 U.S. 510 (1968).

penalty.¹⁰⁰ Second, in *Crampton v. Ohio*¹⁰¹ it was argued that (1) the combination guilt and penalty determination of the jury in a death penalty case denied the defendant an opportunity to plead facts in mitigation of his sentence without also giving up his privilege against self-incrimination and (2) the absence of sentencing standards to guide jury discretion in capital cases contravenes due process of law. Both arguments were rejected by the Court. Finally, it has been argued that the cruel and unusual punishment clause of the eighth amendment prohibits the further imposition of capital punishment.¹⁰² Although the Court has never decided the issue, several cases are now pending before it presenting the issue;¹⁰³ and the California Supreme Court has held that under the California constitutional provision proscribing cruel and unusual punishment the death penalty is unconstitutional.¹⁰⁴

Statutory provisions in this country proscribing the death penalty are, with regard to methodology, rich in their diversity. Generally, capital punishment is reserved for certain specific crimes of violence (usually murder) and is imposed by the jury in the same proceeding as the guilty determination¹⁰⁵ or after a separate hearing on the penalty.¹⁰⁶ Under the present law in Ohio, the death penalty is reserved for a number of homicidal offenses besides murder in the first degree. With two exceptions,¹⁰⁷ the jury or a three judge panel¹⁰⁸ in capital cases has the absolute discretion to recommend mercy which will change the automatic imposition of capital punish-

¹⁰⁰ In practical application, however, prospective jurors can be excluded from a so-called "death qualified" jury if the individual is totally opposed to the imposition of capital punishment.

¹⁰¹ 402 U.S. 183 (1971).

¹⁰² For a full exposition of the argument, see Goldberg and Derskowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773 (1970) [hereinafter cited as Goldberg and Derskowitz].

¹⁰³ See *Aikens v. California*, 70 Cal.2d 369, 450 P.2d 258, 74 Cal. Rptr. 882 (1969), cert. granted, 403 U.S. 952 (1971); *Jackson v. Georgia*, 225 Ga. 790, 171 S.E.2d 501 cert. granted, 403 U.S. 952 (1971); *Furman v. Georgia*, 225 Ga. 253, 167 S.E.2d 628 (1969), (1969), cert. granted, 403 U.S. 952 (1971); *Branch v. Texas*, 447 S.W.2d 932 (Tex. Ct. Crim. App. 1969), cert. granted, 403 U.S. 952 (1971).

¹⁰⁴ *People v. Anderson*, 40 U.S.L.W. 2552 (Cal. Sup. Ct. Feb. 18, 1972). The California court based its decision in part on the idea that the death penalty was impermissibly cruel due to the brutal psychological tortures of impending execution. See the President's Commission on Law Enforcement and Administration of Justice, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 153 (1967): "When a State finds that it cannot administer the penalty in [a fair and expeditious] manner, or that the death penalty is being imposed but not carried into effect, the penalty should be abandoned." See also *TASK FORCE REPORT: THE COURTS* 28: "The spectacle of men living on death row for years . . . contradicts our image of humane and expeditious punishment of offenders."

¹⁰⁵ See M.P.C. § 201.6, Comment at 74 (Tent. Draft No. 9).

¹⁰⁶ See CAL. PENAL CODE § 190.1 (West 1970); N.Y. PENAL LAW § 125.35 (McKinney 1967); CONN. GEN. STAT. REV. § 53-10 (Supp. 1963); PA. STAT. ANN. § 4701 (Purdon 1963); ILL. REV. STAT. ch. 38, §§ 1-7(c), 9-1 (Smith-Hurd 1964).

¹⁰⁷ OHIO REV. CODE ANN. § 2901.09-10 (Page 1954) (mandatory death sentence if the governor or the president is assassinated).

¹⁰⁸ See OHIO REV. CODE ANN. § 2945.06 (Page 1954).

ment into a sentence of life with no hope for parole.¹⁰⁹ The jury, though, is usually not given any standards to guide its discretionary determination;¹¹⁰ and after the decision in *Crampton*, there is no constitutional compulsion on the trial court to give the jury any instructions in the area. However, the standardless jury discretion in Ohio has been severely criticized because in this crucial decision between life and death the jury will not have the quality of information that a judge normally would have in the sentencing process.¹¹¹ Furthermore, although allocution is not constitutionally compelled, fairness and equitable principles indicate that Ohio's unitary procedure in capital cases places too heavy a burden on the defendant to present facts in mitigation of the infliction of capital punishment.

Although the Technical Committee desired to abolish capital punishment in Ohio,¹¹² it decided that political expediency required the retention of alternative sentences of death or twenty years to life imprisonment in the original proposal.¹¹³ However, the original proposed sections on imposing sentences in capital cases (that is, capital murder under the original proposed code) would have made two important deviations from the present Ohio practice. First, the proceedings in a capital case were to be divided into separate guilt and penalty determinations.¹¹⁴ Instead of the present

¹⁰⁹ There are only two other statutes in Ohio that allow the jury to mitigate a sentence by its recommendation of mercy. See OHIO REV. CODE ANN. § 2907.09 (Page 1954) (breaking and entering of an inhabited dwelling). OHIO REV. CODE ANN. § 2907.141 (Page 1954) (robbery and unlawful entry of a financial institution).

¹¹⁰ See *State v. Caldwell*, 135 Ohio St. 424, 21 N.E.2d 343 (1939).

¹¹¹ Brief for Petitioner at 22-23, *Crampton v. Ohio*, 402 U.S. 183 (1971).

¹¹² The Technical Committee to Study Ohio Criminal Laws and Procedures, Draft No. 23, Comments at 17 (April 17, 1967).

¹¹³ PROP. OHIO CRIM. CODE § 2929.01(A):

Whoever is convicted of or pleads guilty to capital murder in violation of Section 2903.01 of the Revised Code shall suffer death, or be imprisoned for an indefinite term of twenty years to life, as determined pursuant to Sections 2929.02 and 2929.03 of the Revised Code.

¹¹⁴ PROP. OHIO CRIM. CODE § 2929.02:

(A) The jury or panel of three judges which tried the offender shall determine the penalty to be imposed for capital offense. If an offender pleads guilty to a capital offense, the penalty shall be determined by a panel of three judges or, when requested by the offender, by a jury impaneled for the purpose.

(B) The penalty shall be separately determined following a verdict or plea of guilty. The jury or panel of judges shall not consider the penalty when determining the innocence or guilt of the accused, and the jury shall be so instructed before retiring to consider its verdict.

(C) A verdict of guilty duly rendered by a properly constituted jury or panel of judges, or a plea of guilty, is not avoided by the subsequent disability of a juror or judge from participating in determining the penalty. In such case, vacancies on the jury or panel of judges shall be filled in the same manner as vacancies occurring during trial.

(D) Before the jury or panel of judges retires to consider the penalty to be imposed for a capital offense, it shall hear such testimony or other evidence as may be presented, the statement, if any, of the offender, and the arguments, if any, of the counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. The court then shall instruct the jury on its duties in determining the penalty.

procedure of death unless there is a recommendation of mercy, the jury to impose death in the penalty proceeding would have had to find affirmatively for death by a unanimous vote. This would have placed squarely upon the shoulders of the jury the onerous decision of life or death rather than allowing death to be imposed by default. In addition, in partial response to criticism aimed at the lack of any opportunity for allocution in the present Ohio practice, the penalty phase would have included an opportunity for the defendant to present arguments, testimony, and other evidence relating to the appropriate penalty.¹¹⁵ Second, criteria similar to the Model Penal Code's formulation would have acted as a guide for the heretofore standardless discretion of the jury in a capital case.¹¹⁶ The enumer-

(E) The jury or panel of judges shall give due consideration to the criteria contained in Section 2929.03 of the Revised Code, in determining the penalty to be imposed on an offender for a capital offense.

(F) The death penalty shall be imposed upon the concurrence therein of all members of the jury or panel of judges, otherwise imprisonment shall be imposed. When the death penalty is returned, the clerk of court shall poll the jury or panel of judges to verify the concurrence therein of each member.

(G) The court shall impose on the offender the penalty provided in Section 2929.01, determined pursuant to this section and Section 2929.03 of the Revised Code.

¹¹⁵ The original proposed procedure was similar to the one presently in operation in California. See CAL. PENAL LAW § 190.1 (West 1970). See also M.P.C. § 210.6(2) (P.O.D.); PROP. FED. CRIM. CODE § 3602.

¹¹⁶ PROP. OHIO CRIM. CODE § 2929.03:

(A) In determining whether to impose death or imprisonment for a capital offense, the jury or panel of judges shall consider the nature and circumstances of the offense, and the history, character, and condition of the offender.

(B) The following shall be considered in favor of imposing the death penalty for a capital offense:

(1) The offense endangered the security, or was intended to endanger the security of this or any other state or the United States.

(2) The offense was the assassination, committed for racial, religious, or political reasons, of a high public official, candidate for high public office, or person of renown or veneration.

(3) The offense was committed for hire, or for purpose of gain.

(4) The offense was committed in order to escape detection, apprehension, trial, or punishment for another offense.

(5) The victim of the offense was a law enforcement officer engaged in his duties at the time of the offense.

(6) The victim of the offense was a child under eighteen, an aged or infirm person, or a person who was particularly unoffending or defenseless.

(7) The victim of the offense was tortured or cruelly abused.

(8) The offender has willfully killed, or attempted to willfully kill more than one person, including the victim of the offense at bar.

(C) The following shall be considered in favor of imposing imprisonment for a capital offense:

(1) The offense was the result of circumstances unlikely to recur.

(2) The victim of the offense induced or facilitated it.

(3) There are circumstances tending to mitigate the offense, though failing to establish a defense.

(4) The offender acted under strong provocation.

(5) The offender has no history of prior assaultive offenses.

(6) The offender is likely to respond affirmatively to rehabilitative treatment.

This set of aggravating and mitigating circumstances may be compared to the formulation of the Model Penal Code. See M.P.C. § 210.6(3-4) (P.O.D.).

ated standards were not intended to be exclusive but were to be considered with other circumstances within the knowledge of the jury including the nature of the offense and the condition of the defendant. The original proposal promised to be a sharp departure from the present practice which at the very least would have given not only a semblance of rationality to the imposition of the death penalty but also a suggestion of fairness because it would have permitted the defendant a chance to mitigate his sentence without incriminating himself.

However, the amended version of the capital sentencing provisions marks a return to the present Ohio law concerning capital punishment.¹¹⁷ Among other things, the scope of capital punishment is expanded from the original proposal to include kidnapping for ransom if the victim is not

¹¹⁷ PROP. OHIO CRIM. CODE § 2929.01(A),(C)-(E) (as amended in SUB. H.B. 511):

(A) Whoever is convicted of or pleads guilty to capital murder in violation of section 2903.01 of the Revised Code shall suffer death, unless the jury or panel of judges trying the accused recommends that mercy be shown him, in which case he shall be imprisoned for life. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

(C) The court shall not impose a fine in addition to imprisonment or death for capital murder, or in addition to imprisonment for murder, unless the offense was committed for hire or for purpose of gain.

(D) The court shall not impose a fine or fines for capital murder or murder which, in the aggregate and to the extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to himself or his dependents, or will prevent him from making reparation for the victim's wrongful death.

(E) Whoever is convicted of or pleads guilty to kidnapping for ransom in violation of division (a)(1) of section 2905.01 of the Revised Code shall suffer death, unless the jury or panel of judges trying the accused recommends that mercy be shown him, in which case he shall be imprisoned for life. If the offender releases the victim in a safe place unharmed, whoever is convicted of or pleads guilty to kidnapping for ransom shall be imprisoned for an indefinite term of ten years to life.

PROP. OHIO CRIM. CODE § 2929.02 (as amended in SUB. H.B. 511):

(A) The jury or panel of three judges which tries the offender shall determine whether or not to recommend that mercy be shown him for a capital offense. If an offender pleads guilty to a capital offense, whether or not to recommend that mercy be shown shall be determined by a panel of three judges or, when requested by the offender, by a jury impaneled for the purpose.

(B) The jury or panel of judges shall give due consideration to the criteria contained in section 2929.03 of the Revised Code, in determining whether or not to recommend that mercy be shown an offender for a capital offense.

(C) A recommendation of mercy shall be returned upon the concurrence therein of a majority of the members of the jury or panel of judges. If a recommendation of mercy is returned, the court shall impose sentence of life imprisonment upon the offender. Otherwise, the court shall impose sentence of death, as provided in section 2929.01 of the Revised Code.

PROP. OHIO CRIM. CODE § 2929.03 (as amended in SUB. H.B. 511):

(A) In determining whether or not to recommend that mercy be shown an offender for a capital offense, the jury or panel of judges shall consider the nature and circumstances of the offense, and the history, character, and condition of the offender.

(B) The following do not control the discretion of the jury or panel of judges, but shall be considered against recommending that mercy be shown an offender for a capital offense:

returned safely.¹¹⁸ In addition, the amended proposal again places the guilt and penalty determinations in a unitary form and requires death to be imposed unless the jury by a majority recommends mercy. However, the amended version with some changes retains the suggested criteria of the original proposal although carefully warning that such standards do not control the jury's discretion.

Formulations like the original proposal have been closely scrutinized. The bulk of criticisms has been directed against the "abstract and sterile" criteria suggested to guide the usual standardless discretion of the jury in capital cases. Moreover, it is contended with some validity that the actual effect of the suggested standards will be to diffuse the sentencing authority's sense of personal responsibility.¹¹⁹ This diffusion, though, is unaccompanied by any increase in rationality because it has been found that the jury as the voice of the community does reach a rational, just and equitable result without the aid of expressed standards.¹²⁰ Similarly, the bifurcated procedure has been criticized because it does not add any more information for the jury's perusal than they would otherwise learn or know while at the

(1) The offense endangered the security, or was intended to endanger the security of this or any other state or the United States;

(2) The offense was the assassination, committed for racial, religious, or political reasons, of a high public official, candidate for high public office, or person of renown or veneration;

(3) The offense was committed for hire, or for purpose of gain;

(4) The offense was committed in order to escape detection, apprehension, trial, or punishment for another offense;

(5) The victim of the offense was a law enforcement officer engaged in his duties at the time of the offense;

(6) The victim of the offense was a person who was particularly unoffending or defenseless;

(7) The offender killed the victim from ambush;

(8) The victim of the offense was tortured or cruelly abused;

(9) The offender has willfully killed, or attempted to willfully kill more than one person, including the victim of the offense at bar.

(C) The following do not control the discretion of the jury or panel of judges, but shall be considered in favor of showing mercy to an offender for a capital offense:

(1) The offense was the result of circumstances unlikely to recur;

(2) The victim of the offense induced or facilitated it;

(3) There are circumstances tending to mitigate the offense, though failing to establish a defense;

(4) The offender acted under strong provocation;

(5) The offender has no history of prior offenses of violence;

(6) The offender is likely to respond affirmatively to rehabilitate [*sic*] treatment.

(D) The criteria listed in Divisions (B) and (C) of this section shall not be construed to limit the matters which may be considered in determining whether or not to recommend that mercy be shown an offender for a capital offense.

¹¹⁸ See PROP. OHIO CRIM. CODE § 2905.01(A)(1) (as amended in SUB. H.B. 511). This statute is a reenactment of Ohio's "Little Lindberg" law. OHIO REV. CODE ANN. § 2901.28 (Page 1954).

¹¹⁹ Brief for United States as Amicus Curiae at 60, *McGautha v. California*, 402 U.S. 183 (1971).

¹²⁰ See Comment, *A Study of the California Penalty Jury in First Degree Murder Cases*, 21 STAN. L. REV. 1297 (1969).

same time allowing the prosecution to show how "jaded" the defendant really is.¹²¹

However, this analysis seems to disregard any rationale of sentencing. If the death penalty is to be retained because it is a necessary instrument to effect the goals of the criminal law, it should be given the aura of reasonableness. A bifurcated procedure requiring the jury to find affirmatively for death coupled with suggested criteria to guide the jury's unlimited discretion would contribute to the idea of a rational deliberation and determination. At the very least the jury should have the same type of information that would be available to a sentencing judge. Due to the various rules of evidence and procedures applicable to a criminal trial, though, certain information will be withheld from their penalty considerations. Certainly, making a decision concerning life and death on less than all the possible information available is not as reasonable as a decision based upon all pertinent data. A bifurcated procedure would allow the jury to have access to all available information, while at the same time safeguarding the defendant's rights during the guilt determination. Furthermore, suggested criteria would be necessary to help the jury to evaluate the information within their knowledge. Although the cost of administering a bifurcated system may be greater than the present practice, it would be slight in comparison to the addition of rationality and competency that a bifurcated procedure would bring into an area where the difference between life and death falls upon the decisions of twelve individuals untrained in the law.

A return to the shape of the present law is unfortunate. But the retention in the amended proposals on capital sentencing of the suggested criteria to guide the jury's discretion without including an affirmative obligation to find for capital punishment has the feared propensity to soothe the consciences of the jurors. If the new Ohio law on capital punishment is to include criteria to guide the discretion of the jury, it should also place the burden of affirmatively finding for death upon the jury to neutralize the possibility of the imposition of the death penalty by default because the defendant did not meet any mitigating circumstances. Moreover, the addition of a bifurcated procedure would aid not only the defense but also, at times, the prosecution. A system for the imposition of capital punishment, like the one originally proposed, would add rationality, fairness and equity to the present practice which is possibly susceptible to the whims of a particular location or time. More important, if capital punishment has any degree of deterrent value, it would benefit from the greater certainty necessary for an effective deterrent that the original proposal would contribute. In the terms of the goals of the criminal law such a system should be adopted in Ohio.

¹²¹ Brief for United States as Amicus Curiae at 116, 124, *McGautha v. California*, 402 U.S. 183 (1971).

Any lengthy discussion of the death penalty inevitably ends where it began. There have been no executions in this country for over five years. Some states although not abolishing capital punishment have discarded their implements of death. Another state has declared that the death penalty contravenes its ideas of cruel and unusual punishment.¹²² As the moratorium on executions continues in anticipation of the United States Supreme Court's pronouncement on the constitutionality of the death penalty, the ranks of death row swell. The spectacle of the lingering death continues. But somehow the concept of the executions of those individuals seems grossly unreal. As one commentator has observed: "The spectre of mass executions — after a moratorium of more than [five] years — threatens to further brutalize a nation already saturated with war, riot, and crime. This generation of Americans has experienced enough killing."¹²³

III. MANSLAUGHTER¹²⁴

At English common law a homicide that was committed without malice aforethought was classified as manslaughter and was not susceptible to the imposition of capital punishment.¹²⁵ From this basic concept separate identifiable categories within the offense of manslaughter developed. One category which was interrelated with the premeditation-deliberation formula permitted the mitigation of an intentional homicide that otherwise would be murder if the offender's self-control was overwhelmed by a "heat of passion" that was caused by "adequate provocation."¹²⁶ Another type of manslaughter classification proscribed unintended homicides that were proximately caused by an unlawful act.¹²⁷ A third class included homicide that was caused by culpable negligence.¹²⁸ In one form or another all modern manslaughter statutes have enacted these basic manslaughter categories.¹²⁹

Ohio's manslaughter statute is typical of the formulations in this coun-

¹²² There is presently some discussion in California concerning an initiative campaign to constitutionalize the death penalty. It would be interesting to see if the people of that state are inclined to include capital punishment within their basic charter.

¹²³ *Goldberg v. Dershowitz*, *supra* note 98, at 1819.

¹²⁴ For a legislative history of the proposed manslaughter provisions in the Ohio House of Representatives, see APPENDIX III, *infra*.

¹²⁵ Wechsler and Michael, *supra* note 1, at 717.

¹²⁶ *Id.* See Gegan, *supra* note 16, at 570.

¹²⁷ Wechsler and Michael, *supra* note 1, at 717. This classification is normally referred to as the misdemeanor-manslaughter rule, an analogue of the felony-murder rule. Actually, in jurisdictions that do not adhere to the common law felony-murder rule, it is a misnomer because felonies other than the listed ones as well as misdemeanors activate the unlawful act doctrine.

¹²⁸ See M.P.C. § 201.3, Comment at 42 (Tent. Draft No. 9).

¹²⁹ *Id.* Commonly, manslaughter is graded on the basis of first degree-second degree or voluntary-involuntary. Thus, first degree or voluntary manslaughter includes intentional, provoked homicides, while second degree or involuntary manslaughter is reserved for the operation of the unlawful act doctrine. See, e.g., PA. STAT. ANN. § 4703 (Purdon 1963).

try.¹³⁰ Although it only directs that "no person shall unlawfully kill another,"¹³¹ it has been interpreted to include both involuntary (the unlawful act doctrine) and voluntary (the provocation formula) manslaughter.¹³² Since traditionally the two degrees of murder have required a purpose to kill and the felony-murder rule has been narrowly applied, the Ohio manslaughter statute has been utilized very broadly. However, while possibly being overinclusive in its effect, Ohio's manslaughter statute is at the same time underinclusive. In other words the statute would criminalize conduct that is considered not very culpable, such as a pure food violation premised on strict liability, and at the same time it would be inapplicable to a more culpable homicide.¹³³ The structuring and grading of the manslaughter categories in the proposed code has been a controversial and difficult task. It is highly uncertain what shape the final provisions will take. However, the impact of the various proposals can be examined to determine the efficacy of their enactment into the proposed Ohio law of homicide.

A. *The Provocation Formula (Voluntary Manslaughter)*

Although some states have distorted the provocation formula and have made it a narrow category of unintended homicide,¹³⁴ Ohio has continually viewed provocation as a mitigating factor in a purposeful killing. The classic statement of the Ohio rule declares that

Voluntary manslaughter is the unlawful and intentional killing of a human being while the slayer is under the influence of a sudden passion or heat of blood produced by an adequate and reasonable provocation and before a reasonable time has elapsed for the blood to cool and reason to assume its habitual control. . . . [I]t is considered that the adequate provocation resulting in sudden passion or heat of blood has momentarily deprived the accused of his reason and he is impelled to act by reason of the provocation and is, therefore, without the capacity to reflect.¹³⁵

In addition, it has been determinated that in Ohio mere words are insufficient provocation and that as a matter of law twenty-four hours is sufficient time to cool.¹³⁶

¹³⁰ OHIO REV. CODE ANN. § 2901.06 (Page 1954).

¹³¹ *Id.* The violation of a municipal ordinance will not satisfy the unlawful act requirement. *State v. Collingsworth*, 82 Ohio St. 154, 92 N.E. 22 (1910).

¹³² *See State v. McDaniel*, 103 Ohio App. 163, 144 N.E.2d 683 (1956), *appeal dismissed*, 166 Ohio St. 378, 142 N.E.2d 654 (1957).

¹³³ *See* The Technical Committee to Study Ohio Criminal Laws and Procedures, Draft No. 23-3 (Legislative Service Commission's Criminal Law Study on Reckless or Mitigated Homicide, Apr. 21, 1970).

¹³⁴ N.Y. PENAL LAW § 125.20 (McKinney 1967) (Practice Commentary).

¹³⁵ *State v. Carter*, 75 Ohio App. 545, 554-55, 58 N.E.2d 794, 798 (1944). *See* 4 O.J.I.—CRIMINAL § 457.25 (1970).

¹³⁶ *State v. Elliott*, 11 Dec. Repr. 332 (Franklin County C.P. 1891).

Like the common law formula, the present Ohio provocation rule focuses on the character and sufficiency of the provocative conduct.¹³⁷ Thus, three questions are customarily asked in determining whether to reduce an intentional killing from murder to manslaughter: (1) whether the provocation was adequate enough to cause a reasonable man to lose his self-control; (2) whether such provocation caused the defendant to lose his self-control; and (3) whether the killing took place while the defendant was not under the control of his rational faculties.¹³⁸ However, if the policy of the provocation formula is to recognize the "frailty of human nature" and the exceptional cases where the legal prohibition fails to affect conduct,¹³⁹ the present Ohio rule has been only partially cognizant. Provocation rules stressing the suddenness of the reaction to the provocative conduct and the source and degree of such conduct gauged by objective standards have been criticized because they fail to consider the compounding of provocation over a period of time and the defendant's beliefs in judging the circumstances about him.¹⁴⁰ Therefore, in response to the deterrence rationale of the rule, modern statements of the provocation formula have moved away from focusing on the provocative conduct and instead have stressed the defendant's mental state vis-à-vis his beliefs concerning his situation.¹⁴¹

The original manslaughter provision in the Proposed Code included categories of reckless homicide, a narrowed version of the misdemeanor-manslaughter rule and a modification of the present Ohio provocation formula along the lines of the Model Penal Code.¹⁴² The drafting history of

¹³⁷ See Moreland, *A Re-examination of the Law of Homicide in 1971: The Model Penal Code*, 59 KY. L.J. 788, 805 (1971) [hereinafter cited as Moreland]; Note, *Manslaughter and the Adequacy of Provocation: The Reasonableness of the Reasonable Man*, 106 U. PA. L. REV. 1021 (1958).

¹³⁸ *State v. Carter*, 75 Ohio App. 545, 555, 58 N.E.2d 794, 798 (1944).

¹³⁹ Williams, *Provocation and the Reasonable Man*, 1954 CRIM. L. REV. (Eng.) 740, 742 [hereinafter cited as Williams].

¹⁴⁰ M.P.C. § 201-3, Comment at 46-48 (Tent. Draft. No. 9); Gegan, *supra* note 16, at 570-72; Moreland, *supra* note 137, at 806; 106 U. Pa. L. Rev., *supra* note 137, at 1037. But see Byrn, *supra* note 17, at 183 (the irresistible impulse test covers all situations where it is desirable and possible to take notice of diminished capacity to conform).

¹⁴¹ See M.P.C. § 210.3(1)(b) (P.O.D.); N.Y. PENAL LAW § 125.20(2) (McKinney 1967); PROP. FED. CRIM. CODE § 1602(b).

¹⁴² PROP. OHIO CRIM. CODE § 2903.03:

(A) No person, while under extreme emotional stress for which there is reasonable explanation or excuse, shall knowingly cause the death of another. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the offender's situation at the time of the offense, under circumstances as he believed them to be.

(B) No person shall recklessly cause the death of another. An offense under Section 2903.05 of the Revised Code does not constitute an offense under this division.

(C) No person shall cause the death of another by committing any offense of violence. An offense under section 2903.05 or 2903.06 of the Revised Code does not constitute an offense under this division.

the original proposal suggests that the present Ohio law on provocation was considered to be too narrow to effectuate the policy of the provocation formula and that the defendant's emotional state at the time of the criminal act was more crucial to a determination of provocation than the cause of the disturbance.¹⁴³ In addition, like the Model Penal Code manslaughter provision, the original proposal attempted to mitigate the sometimes harsh objectivity of the present law by considering the subjective element of the defendant's viewpoint. However, the subjective analysis would not have included all of the defendant's individual peculiarities because the final test of sufficiency of the explanation was an objective one. In other words, a defendant's erroneous impression of certain circumstances would have been taken into account but a defendant's peculiar susceptibility to a particular stimulus would not.¹⁴⁴ Thus, under the original proposal on the provocation formula, two questions would have been asked in determining whether the "provocation" mitigated an intentional killing: (1) Did the defendant act while under extreme emotional stress, and (2) Taking into consideration the defendant's situation as he believed it to be, was there a reasonable explanation or excuse for the emotional stress? As originally proposed, all manslaughter categories were to be felonies of the third degree.¹⁴⁵

Although some thought was given in the committee sessions of the General Assembly to upgrading the provocation formula to a felony of the second degree and making it only applicable to the murder offense without changing any substance of the original proposal,¹⁴⁶ the amended provision on the provocation formula materially altered the original proposal and partially returned to the nomenclature of the present Ohio law of voluntary manslaughter.¹⁴⁷ Two significant changes from the original proposal

(D) Whoever violates this section is guilty of manslaughter, a felony of the third degree.

The original proposal on the provocation formula that uses the mental element of "knowingly" would have mitigated both capital murder and murder situations. *See* PROP. OHIO CRIM. CODE § 2901.22(E). Hence, the proposal would be no different in application than the present Ohio law.

¹⁴³ The Technical Committee to Study Ohio Criminal Laws and Procedures, Draft No. 23, Comments at 15 (Apr. 17, 1967). Shifting the focus of the provocation formula to the mental state of the defendant will not completely disregard the element of the provocative conduct. On the other hand, particularly rigid rules of sufficiency will be inapplicable and the "reasonable explanation or excuse" will be judged in light of all the circumstances of the case. M.P.C. § 201.3, Comment at 47 (Tent. Draft No. 9).

¹⁴⁴ *See* Danforth, *supra* note 5, at 165; Gegan, *supra* note 16, at 571-73; Williams, *supra* note 139, at 747. A suggested difficulty with an entirely subjective test is the possibility of greater punishment for a person of self-control than for a highly excitable person. *See* 106 U. PA. L. REV., *supra* note 137, at 1037.

¹⁴⁵ The maximum penalty for a felony of the third degree is four to 10 years. PROP. OHIO CRIM. CODE § 2929.04(B)(3).

¹⁴⁶ The maximum penalty for a felony of the second degree is six to 15 years. PROP. OHIO CRIM. CODE § 2929.04(B)(2).

¹⁴⁷ PROP. OHIO CRIM. CODE § 2903.03 (as amended in SUB. H.B. 511):

(A) No person, while under extreme emotional stress brought on by serious

deserve close scrutiny. First, the penalty for voluntary manslaughter was increased to a felony of the first degree.¹⁴⁸ This increase makes the proposed punishment for the offense substantially longer than the present penalty,¹⁴⁹ and evidences a dissatisfaction with the lack of severity of the present law. The rationale for this change is uncertain. A "knowing" homicide that was committed while the perpetrator was under an extreme emotional stress is considered generally of greater culpability than the other categories enumerated under the original manslaughter proposal. Therefore, such a homicide is deserving of harsher treatment. However, the magnitude of the change seems to be out of proportion to the theoretical foundations of the provocation formula that purports to mitigate an intentional homicide because the defendant's acts were so controlled by his emotions that he lacked the required mental state for murder.¹⁵⁰

Second and more importantly, the amended proposal seems to reinstate the present provocation formula. Although the language would indicate more of an amalgamation of the original proposal and the present law, the amended proposal once again focuses upon the objective sufficiency of the provocative conduct and deletes the idea that the reasonableness of the provocation should be determined from the defendant's viewpoint. This return to the present raises doubts about the application of the provocation formula to mental distress built up over a long duration. Furthermore, the harshness of the pure objective test fails to consider the defendant who is mistaken about the provocative circumstances. Taking into consideration the defendant's position would clarify the objective evaluation of the provocative cause of the extreme emotional distress and would allow a defendant who is mistaken to be prosecuted for manslaughter and not for murder.

Whatever the final shape of the statute on voluntary manslaughter, though, the provocation formula is but a compromising recognition that

provocation reasonably sufficient to incite him into using deadly force, shall knowingly cause the death of another.

(B) Whoever violates this section is guilty of voluntary manslaughter, a felony of the first degree.

¹⁴⁸ The maximum penalty for a felony of the first degree is 10 to 25 years imprisonment. PROP. OHIO CRIM. CODE § 2929.04(B)(1).

¹⁴⁹ The maximum penalty for manslaughter under the present Ohio law is one to 20 years imprisonment. OHIO REV. CODE ANN. § 2901.06 (Page 1954).

¹⁵⁰ A possible explanation for this change might be derived from an outmoded idea on the effect of deterrence:

For whatever the motive to kill, the threat of unwelcome treatment at the hands of the law provides a competing motive to refrain from killing. . . . [I]t cannot be denied that the creation of the motive *may* not only lead selfish and deliberate men to refrain from homicide . . . , but *may* also lead altruistic men to endeavor to serve their altruistic ends in non-homicidal ways and excitable men to control their excitement, whatever its cause. In short, it cannot be denied in general that men may be led to control their passions by the threat of unpleasant treatment if they do not do so.

Wechsler and Michael *supra* note 1, at 735-36.

deterrence at times fails to stop men from acting with homicidal intent. Yet, testing provocation in terms of the reasonable man seems illusory. As Glanville Williams observed, "[H]ow can it be admitted that the paragon of virtue, the reasonable man, gives way to provocation?"¹⁵¹ In the final analysis the real issue is whether the actor's loss of self-control can be understood by the jury in terms that arouse sympathy enough to call for mitigation in sentence.¹⁵²

B. *Reckless Homicide (Involuntary Manslaughter)*

As originally proposed, reckless homicide was to be one of three categories making up the offense of manslaughter.¹⁵³ However, the amended proposal labels the offense of reckless homicide as involuntary manslaughter punishable like the original manslaughter proposal as a felony of the third degree.¹⁵⁴ Most modern applications of reckless homicide include it in either a unitary definition of manslaughter¹⁵⁵ or in a lesser classification than the provocation formula.¹⁵⁶

There is no provision in the present Ohio law comparable to the idea of reckless homicide. The present offense of involuntary manslaughter encompasses the unlawful act doctrine which was criticized by the drafters of the original proposal as both underinclusive and overinclusive in its operation. Additionally, the unlawful act doctrine was criticized because it fit poorly in a system of grading criminal offenses based upon a defendant's conduct and state of mind. The drafters believed that "the designation of the culpable mental state [was] a much more refined and better tailored solution to describe the same evils as a blanket provision covering violation of any statute."¹⁵⁷ Thus, a "reckless" mens rea was used to criminalize homicides in which the perpetrator ignored a substantial likelihood of a homicidal risk.¹⁵⁸

If "recklessly" were defined as originally proposed, reckless homicide would exclude deaths proximately related to strict liability offenses unlike

¹⁵¹ Williams, *supra* note 134, at 742.

¹⁵² M.P.C. § 201.3, Comment at 48 (Tent. Draft No. 9); Byrn, *supra* note 17, at 179.

¹⁵³ *Supra* note 142.

¹⁵⁴ PROP. OHIO CRIM. CODE § 2903.04 (as amended in SUB. H.B. 511):

(A) No person shall recklessly cause the death of another. An offense under section 2903.06 of the Revised Code does not constitute an offense under this section.

(B) Whoever violates this section is guilty of involuntary manslaughter, a felony of the third degree.

¹⁵⁵ M.P.C. § 210.3 (P.O.D.); PROP. FED. CRIM. CODE § 1602.

¹⁵⁶ N.Y. PENAL LAW § 125.15 (McKinney 1967) (manslaughter in the second degree).

¹⁵⁷ The Technical Committee to Study Ohio Criminal Laws and Procedures, Draft No. 23, Comments at 14 (Apr. 17, 1967).

¹⁵⁸ For examples of the operation of the reckless homicide provision applying the Model Penal Code definition of "recklessly," see PROP. OHIO CRIM. CODE § 2903.03, Comments at 74.

the unlawful act doctrine and would criminalize reckless conduct proximately related to a homicide even though the conduct did not involve the violation of a statute. This would be in keeping with the policy and purpose of a criminal code to prevent physical harm by punishment and deterrence. However, as the discussion on the felony-murder rule pointed out, the amended definition of "recklessly" leaves in doubt the exact impact of the reckless homicide provision.

If "recklessly" is interpreted to mean a subjective negligence standard instead of a conscious and unjustifiable disregard of a substantial homicidal risk, various anomalies in the system of gradation will be created. For example, if X were handling acid and acting with "heedless indifference" to any potential homicidal consequences and such "carelessness" caused the death of another, X would be prosecuted under the involuntary manslaughter even though he was unaware of any substantial homicide risk. If he were found guilty, he could receive a maximum sentence of imprisonment of 4 to 10 years.¹⁵⁹ On the other hand, if Y were playing with a gun and failing to exercise due care toward a substantial risk and the gun discharged killing another, Y would be prosecuted under the negligent homicide provision¹⁶⁰ and could receive a maximum sentence of imprisonment of six months. The different treatment of X and Y does not seem logical compared with their similar mental states and conduct. The result is even less consistent with the classification theory of the code that considers the use of a deadly weapon as an aggravating factor.¹⁶¹ If the original definition of "recklessly" were used, X's conduct would be either non-criminal or, if it violated a statute, negligent homicide.

IV. LESSER HOMICIDES

A. *Negligent Homicide*

Criminal negligent homicide at common law was one of the categories of manslaughter.¹⁶² The culpable negligence standard, though, was not tied to the idea of ordinary tort negligence but rather turned upon a gross deviation from an ordinary standard of care.¹⁶⁴ This idea of a "gross negligence" standard has continued in modern formulations of the offense of negligent homicide.¹⁶⁵ Many of these recent enactments have

¹⁵⁹ PROP. OHIO CRIM. CODE § 2929.04(B)(3).

¹⁶⁰ PROP. OHIO CRIM. CODE § 2903.05 (as amended in SUB. H.B. 511).

¹⁶¹ Compare PROP. OHIO CRIM. CODE § 2903.11, with PROP. OHIO CRIM. CODE § 2903.12-.13.

¹⁶² For a legislative history of the proposed provisions on negligent and vehicular homicides in the Ohio House of Representatives, see APPENDIX III, *infra*.

¹⁶³ For a short history of the common law development of negligent homicide, see Byrn, *supra* note 17, at 203.

¹⁶⁴ See M.P.C. § 201.4, Comment at 50 (Tent. Draft No. 9); Byrn, *supra* note 17, at 203.

¹⁶⁵ See N.Y. PENAL LAW § 125.10 (McKinney 1967); M.P.C. § 210.4 (P.O.D.); PROP. FED. CRIM. CODE § 1603.

been directed at the problem of vehicular homicides because the fact of jury nullification made it very difficult to accuse anyone involved in a fatal auto accident of manslaughter.¹⁶⁶ Thus, negligent homicide has filtered out of manslaughter and has become a separate offense.

Although the concept of criminalizing negligent conduct seems to be firmly entrenched in Anglo-American jurisprudence, there has been a serious challenge to the propriety of criminalizing inadvertence when the policy of the criminal code stresses deterrence goals. Hence, on the one hand it is argued that criminalizing negligence, even gross negligence, adds nothing to the deterrence factor of the criminal law because the threat of punishment has no effect upon an actor who is unaware of the substantial risk of harm.¹⁶⁷ Instead culpable negligence reenforces the retributive goals of the criminal law that strike out indiscriminately at the consequences of conduct without regard to the mental state of the actor.¹⁶⁸ On the other hand it is asserted that although generally negligence should be insufficient to impose criminal liability, it is adequate when a maximum preventive effort requires an additional motive to cause an individual to take care before acting.¹⁶⁹ Since the prevention of physical harm is one of the primary goals of a rational criminal code, the criminalization of conduct evidencing a gross deviation from the normal standard of conduct should stand as a warning to individuals to be alert to homicidal risks. When the standard is gross negligence, ignorance of such substantial circumstances passes beyond inadvertence and infringes on the realm of incompetence.¹⁷⁰ However, a statute punishing gross negligence should give reference to the circumstances surrounding the imposition of the sanction if alertness is to be prompted.¹⁷¹

There is no offense in the present Ohio criminal law that punishes inadvertent homicide. Negligent homicides are either criminal because they are proximately related to the violation of an offense (involuntary manslaughter) or non-criminal and punished by civil sanctions. Since negligent vehicular homicides were treated specially in the Proposed Code,¹⁷² the orig-

¹⁶⁶ See M.P.C. § 201.4, Comment at 53-55 (Tent. Draft No. 9).

¹⁶⁷ G. WILLIAMS, CRIMINAL LAW: GENERAL PART 122-23 (1961); Byrn, *supra* note 17 at 207-08; Collings, *Negligent Murder—Some Stateside Footnotes to Director of Public Prosecutions v. Smith*, 49 CAL. L. REV. 254, 286 (1961) [hereinafter cited as Collings]; Hall, *Negligent Behavior Should Be Excluded from Penal Liability*, 63 COLUM. L. REV. 632 (1963).

¹⁶⁸ G. WILLIAMS, CRIMINAL LAW: GENERAL PART 122 (1961); Collings, *supra* note 167, at 285.

¹⁶⁹ See M.P.C. § 201.4, Comment at 53 (Tent. Draft No. 9); Wechsler, *supra* note 3, at 1439; Fletcher, *The Theory of Criminal Negligence: A Comparative Analysis*, 119 U. PA. L. REV. 401 (1971). The opposition to criminalizing negligence has recently been criticized because it inconsistently holds everyone to strict liability in knowing the law but rejects punishing anyone ignorant of factual risks. 119 U. PA. L. REV. at 420.

¹⁷⁰ Byrn, *supra* note 17, at 209.

¹⁷¹ *Id.*

¹⁷² See PROP. OHIO CRIM. CODE §§ 2903.06-07 (as amended in SUB. H.B. 511).

inal proposal on negligent homicide (unchanged by the amended version) criminalizing only negligent conduct in regard to deadly weapons and ordinance was very narrow in its application.¹⁷³ Putting to one side the controversy over the criminalization of negligent behavior, the original proposal seemed to be justified by the great potential for harm and the possibility of effective deterrent value.¹⁷⁴

However, the difficulty in the original proposal that continues in the amended version is the definition of "negligently."¹⁷⁵ When "negligently" is defined, as it is in the Proposed Code, to refer to ordinary tort negligence (that is, a simple deviation from the standard of due care required by the circumstances), much of the argument for the criminalization of negligent behavior is frustrated. Furthermore, it is hard to see how the security of human life is enhanced by the punishment of inadvertence not involving a gross deviation from a reasonable standard of care.¹⁷⁶ Although the criminal law in condemning negligent homicide may not be impotent to stimulate care that may not otherwise be taken, such stimulation will undoubtedly only alert an actor to the grossest inadvertence. If tort negligence is used to define negligent homicide, the retributive goal of the criminal law is re-enforced without adding to any deterrence justification. Therefore, to receive the full benefit of the negligent homicide offense, a gross negligence standard should be utilized.¹⁷⁷

Besides including the specific provision on inadvertent homicide, the amended version of the proposed negligent homicide statute also contains the unlawful act doctrine or the "misdemeanor-manslaughter" rule.¹⁷⁸ Un-

¹⁷³ PROP. OHIO CRIM. CODE § 2903.04:

(A) No person shall negligently cause the death of another by means of a deadly weapon or dangerous ordinance as defined in section 2923.11 of the Revised Code.

(B) Whoever violates this section is guilty of negligent homicide, a misdemeanor of the first degree.

¹⁷⁴ For examples of the operation of the original proposal on negligent homicide, see PROP. OHIO CRIM. CODE § 2903.04, Committee Comments at 75.

¹⁷⁵ PROP. OHIO CRIM. CODE § 2901.22(D):

A person acts negligently when he fails to exercise due care to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to circumstances when he fails to exercise due care to perceive or avoid a risk that such circumstances may exist.

¹⁷⁶ G. WILLIAMS, CRIMINAL LAW: GENERAL PART 122 (1961).

¹⁷⁷ But see Annot., 20 A.L.R.3d 473, 476 (1968) (negligence in a statute punishing negligent homicide usually refers to ordinary negligence distinguished from criminal or gross negligence). The Technical Committee viewed the negligent homicide section as an important weapons control provision. See PROP. OHIO CRIM. CODE § 2903.04, Committee Comments at 75. However, a homicide provision seems like an inappropriate vehicle to control weapons. If the drafters of the code were serious about weapons control, they should have created a separate and well-delineated statute.

¹⁷⁸ PROP. OHIO CRIM. CODE § 2903.05 (as amended in SUB. H.B. 511):

(A) No person shall negligently cause the death of another by means of a deadly weapon or dangerous ordinance as defined in section 2923.11 of the Revised Code.

(B) No person shall cause the death of another by committing any offense.

der the present Ohio law, the unlawful act doctrine is encompassed in the concept of involuntary manslaughter.¹⁷⁹ As it has been noted previously, the concept suffers at the same time from being overinclusive and underinclusive.¹⁸⁰ The unlawful act doctrine has been criticized because it has no place in a modern criminal code which grades offenses according to culpable mental states and conduct and because there is no basis in experience to presume that a particular mental state in relation to the homicide is satisfied by the *mens rea* requirement of the underlying offense.¹⁸¹

The original manslaughter proposal lumped the unlawful act doctrine with other categories but limited its application to only offenses of violence.¹⁸² Although it would be patently sensible not to include the unlawful act doctrine as a classification of criminal liability, the inclusion of the concept within the amended proposal on negligent homicide seems to be a realistic appraisal of its value in a modern criminal code. However, even this treatment of the unlawful act doctrine will criminalize not only negligent conduct but also homicides caused by the violation of strict liability offenses. This latter application of the doctrine does not fulfill any deterrence value of the criminal law and seems only to satisfy a goal of retribution without adding to the security of human life. The goals of the criminal law would not suffer significantly if the unlawful act doctrine were deleted entirely from criminal liability and such harm were treated with civil sanctions.

B. *Vehicular Homicide*

Homicides caused by the operation of motor vehicles (that is, automobiles, locomotives, watercraft and aircraft) may be treated by a criminal code in several different ways. Of course, vehicular homicides committed under the appropriate circumstances would be susceptible to the application of the capital murder, murder or manslaughter provisions of a typical penal code.¹⁸³ An acceptable method to deal with vehicular homicides caused by inadvertent conduct which would recognize the deterrence value of civil sanctions would be not to criminalize them at all. Generally, though, prior to the recent wave of penal code revisions, vehicular homicides that

An offense under section 2903.06 or 2903.07 of the Revised Code does not constitute an offense under this division.

(C) Whoever violates this section is guilty of negligent homicide, a misdemeanor of the first degree.

¹⁷⁹ OHIO REV. CODE ANN. § 2901.06 (Page 1954).

¹⁸⁰ Some mitigation of the problem of overinclusiveness may be found in *Black v. State*, 103 Ohio St. 434, 133 N.E. 795 (1921). In *Black* the Ohio Supreme Court interpreted the precursor of the present unlawful act doctrine to refer to unlawful acts that could be reasonably anticipated by an ordinary prudent person as likely to result in a homicide.

¹⁸¹ See Byrn, *supra* note 17, at 203; Packer, *The Model Penal Code and Beyond*, 63 COLUM. L. REV. 594, 599 n.21 (1963).

¹⁸² PROP. OHIO CRIM. CODE § 2903.03(C).

¹⁸³ See Annot., 21 A.L.R.3d 116 (1967).

were caused by inadvertent or reckless conduct were criminalized under manslaughter statutes or not at all.¹⁸⁴ However, many states faced with the fact of jury nullification in the area have enacted special statutes reducing the grade of the offense and the possible punishment.¹⁸⁵ More recent proposals on the subject have classified vehicular homicides caused by reckless behavior as manslaughter, while criminalizing grossly negligent vehicular homicides under the broad category of negligent homicide.¹⁸⁶ However, these proposals make it clear that if the negligent behavior is not a gross deviation from an ordinary standard of care, then the conduct should not be punished beyond the sanctions of the traffic offense and of any civil liability.¹⁸⁷

Originally, in Ohio, an unintentional homicide that was proximately caused by the violation of any traffic offense was classified as manslaughter of the second degree.¹⁸⁸ This extension of the unlawful act doctrine into the vehicular homicide area at times was considered to produce harsh results.¹⁸⁹ Hence, in 1967, second degree manslaughter was reclassified and regraded into first and second degree homicide by vehicle.¹⁹⁰ Thus, under the present Ohio law first degree homicide by vehicle includes an unintentional homicide proximately caused by the violation of four specified traffic offenses: (1) driving while intoxicated or drugged;¹⁹¹ (2) reckless operation of a motor vehicle;¹⁹² (3) drag racing;¹⁹³ and (4) reckless operation of a motor vehicle off the streets.¹⁹⁴ Second degree vehicular homicide encompasses deaths proximately caused by violating any traffic regulation other than the ones enumerated in the first degree section.¹⁹⁵

¹⁸⁴ See, e.g., GA. CODE ANN. § 26-1103 (1971).

¹⁸⁵ See M.P.C. § 201.4, Comment at 53-54 (Tent. Draft No. 9). See also Riesenfeld, *Negligent Homicide—A Study in Statutory Interpretation*, 25 CAL. L. REV. 1 (1936); Moreland, *supra* note 137, at 825.

¹⁸⁶ See N.Y. PENAL LAW § 125.10 (McKinney 1967); M.P.C. § 210.4 (P.O.D.); PROP. FED. CRIM. CODE § 1603.

¹⁸⁷ M.P.C. § 201.4, Comment at 55 (Tent. Draft No. 9).

¹⁸⁸ OHIO REV. CODE ANN. § 4511.18 (Page 1965). The provision had alternative penalties: (1) fine of not more than five-hundred dollars or imprisonment for not less than thirty days or more than six months, or both; or (2) imprisonment in the penitentiary for not less than one nor more than twenty years. OHIO REV. CODE ANN. § 4511.99(a) (Page 1965).

¹⁸⁹ See 47 IOWA L. REV. 168, 170 (1961).

¹⁹⁰ OHIO REV. CODE ANN. §§ 4511.18, .181 (Page Supp. 1970).

¹⁹¹ OHIO REV. CODE ANN. § 4511.19 (Page 1965).

¹⁹² OHIO REV. CODE ANN. § 4511.20 (Page 1965).

¹⁹³ OHIO REV. CODE ANN. § 4511.25 (Page Supp. 1970).

¹⁹⁴ OHIO REV. CODE ANN. § 4511.201 (Page Supp. 1970). The penalty for first degree vehicular homicide is either a fine of not more than five-hundred dollars or imprisonment for not less than 30 days nor more than six months, or both, or imprisonment in the penitentiary for one to 20 years. OHIO REV. CODE ANN. § 4511.99(B) (Page Supp. 1970).

¹⁹⁵ The penalty for second degree vehicular homicide is a fine of not more than five-hundred dollars or imprisonment for not less than 30 days nor more than six months. OHIO REV. CODE ANN. § 4511.99(A) (Page Supp. 1970).

The amended proposed sections on vehicular homicides retain the basic classification of the present Ohio law.¹⁹⁶ They are, though, somewhat more expansive in their coverage of vehicular homicides because they include not only homicides caused by automobiles but also homicides caused by watercraft, aircraft, and locomotives.¹⁹⁷ The basic change that the proposed vehicular homicide sections impose on the present law is that they base the classification of the offenses solely on the culpable mental state of the defendant rather than on the violation of any traffic regulation. Thus, aggravated vehicular homicide requires a "reckless" *mens rea* while the vehicular homicide offense only calls for negligence. With the requisite mental state of "recklessly," aggravated vehicular homicide applies not only to reckless homicides that otherwise would be classified as manslaughter but also to homicide that would be classified under the present law as either first or second degree homicide by vehicle. Depending upon the mental state of the offender, the proposed offense could possibly be applied to deaths caused by vehicle that are outside the scope of present criminal liability.¹⁹⁸ Similarly, the offense of vehicular homicide premised on a negligence standard would be applicable to homicides caused by the negligent operation of vehicles whether a safety regulation is violated or not.¹⁹⁹ Even

¹⁹⁶ PROP. OHIO CRIM. CODE § 2903.06 (as amended in SUB. H.B. 511) (aggravated vehicular homicide):

(A) No person, while operating or participating in the operation of a motor vehicle, locomotive, watercraft, or aircraft, shall recklessly cause the death of another.

(B) Whoever violates this section is guilty of aggravated vehicular homicide, a felony of the fourth degree. If the offender has previously been convicted of an offense under this section or section 2903.07 of the Revised Code, aggravated vehicular homicide is a felony of the third degree.

PROP. OHIO CRIM. CODE § 2903.07 (as amended in SUB. H.B. 511) (vehicular homicide):

(A) No person, while operating or participating in the operation of a motor vehicle, locomotive, watercraft, or aircraft, shall negligently cause the death of another.

(B) Whoever violates this section is guilty of vehicular homicide, a misdemeanor of the first degree. If the offender has previously been convicted of an offense under this section or section 2903.06 of the Revised Code, vehicular homicide is a felony of the fourth degree.

Except for the addition of provisions aimed at recidivists, the sections are substantially unchanged from the Technical Committee's original proposal. See PROP. OHIO CRIM. CODE §§ 2903.04-05.

¹⁹⁷ Although there is no present statute in Ohio covering homicides caused by violations of regulations concerning aircraft, there are statute dealing with homicides in connection with watercraft and locomotives. See OHIO REV. CODE ANN. § 1547.13 (Page 1964) (watercraft); OHIO REV. CODE ANN. § 4999.04 (Page 1954) (locomotives). The proposed provisions on vehicular homicide replace those statutes. See PROP. OHIO CRIM. CODE § 2903.05, Committee Comments at 76.

¹⁹⁸ The possibility of construing the language of the amended definition of "recklessly" to mean a subjective negligence standard should be kept in mind. However, the drafter's comments to the original proposal on aggravated vehicular homicide suggest that "recklessly" in this regard originally meant "heedless indifference to the consequences." See PROP. OHIO CRIM. CODE § 2093.05, Committee Comments at 76.

¹⁹⁹ The negligent *mens rea* requirement may possibly have only the one-sided effect of including homicides that would not be criminal under the present law rather than eliminating the possibility of strict liability because violations of specific safety statutes in Ohio

if the negligence standard for criminal liability is defined finally as ordinary tort negligence instead of gross negligence, the application of the proposed vehicular homicide statute would be at least parallel to the imposition of civil liability.²⁰⁰

The proposed sections of vehicular homicide wisely follow the general system of gradation adopted by the Proposed Code. However, the propriety of punishing vehicular homicides in separate provisions from the usual categories of criminal liability is not without doubt. Pragmatically, though, the factor of jury nullification in the area of vehicular homicides requires special treatment. Putting to one side the problems with the definitions of the two mental states which have been discussed previously, the proposed sections will serve the function of the prevention of physical harm well.

David A. Gradwohl

APPENDIX I

A Legislative History in the Ohio House of Representatives of the Proposed Ohio Criminal Code Provisions on Capital Murder and Murder

1. The following represent the original versions of the proposed capital murder and murder provisions that were introduced to the House in HOUSE BILL NO. 511:

CAPITAL MURDER

Sec. 2903.01. (A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another by means of a firearm or dangerous ordnance carried in violation of section 2923.12 of the Revised Code.

(C) No person shall recklessly cause the death of another while committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(D) Whoever violates this section is guilty of capital murder, and shall be punished as provided in section 2929.01 of the Revised Code.

MURDER

Sec. 2903.02. (A) No person shall knowingly cause the death of another.

(B) Whoever violates this section is guilty of murder, and shall be punished as provided in section 2929.01 of the Revised Code.

has been held to be negligence per se. *Eisenhuth v. Moneyham*, 161 Ohio St. 367, 119 N.E. 2d 440 (1954).

²⁰⁰ For a critical analysis of Ohio's present vehicular homicide law based upon the theory that the Ohio law imposes criminal liability where there would be no civil sanction, see Note, 47 IOWA L. REV. 168 (1961).

2. The following represent the versions of the proposed capital murder and murder provisions that were designated as draft SUBSTITUTE HOUSE BILL No. 511:

CAPITAL MURDER

Sec. 2903.01. (A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another whom he knows is a law enforcement officer performing his duties in protecting persons or property, preventing or detecting crime, apprehending or detaining offenders, or otherwise enforcing the law.

(C) No person shall recklessly cause the death of another while committing or attempting to commit or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(D) Whoever violates this section is guilty of capital murder, and shall be punished as provided in section 2929.01 of the Revised Code.

MURDER

Sec. 2903.02. (A) No person shall knowingly cause the death of another.

(B) Whoever violates this section is guilty of murder, and shall be punished as provided in section 2929.01 of the Revised Code. If an offense under this section takes place while the offender is under extreme emotional stress for which there is reasonable explanation or excuse, murder is a felony of the second degree. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the offender's situation at the time of the offense, under circumstances as he believed them to be.

3. The following represent the versions of the proposed capital murder and murder provisions that were passed by the Ohio House of Representatives as SUBSTITUTE HOUSE BILL No. 511:

CAPITAL MURDER

Sec. 2903.01. (A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another whom he knows is a law enforcement officer performing his duties in protecting persons or property, preventing or detecting crime, apprehending or detaining offenders, or otherwise enforcing the law.

(C) No person shall recklessly cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(D) Whoever violates this section is guilty of capital murder, and shall be punished as provided in section 2929.01 of the Revised Code.

MURDER

Sec. 2903.02. (A) No person shall knowingly cause the death of another.

(B) Whoever violates this section is guilty of murder, and shall be punished as provided in section 2929.01 of the Revised Code.

APPENDIX II

*A Legislative History in the Ohio House of Representatives
of the Proposed Ohio Criminal Code Provisions on Penalties
for Murder and the Imposition of Capital Punishment.*

1. The following represent the original versions of the proposed provisions for murder penalties that were introduced to the House in HOUSE BILL No. 511:

PENALTIES FOR MURDER

Sec. 2929.01. (A) Whoever is convicted of or pleads guilty to capital murder in violation of section 2903.01 of the Revised Code shall suffer death, or be imprisoned for an indefinite term of twenty years to life, as determined pursuant to sections 2929.02 and 2929.03 of the Revised Code.

(B) Whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life.

IMPOSING SENTENCE FOR A CAPITAL OFFENSE

Sec. 2929.02. (A) The jury or panel of three judges which tried the offender shall determine the penalty to be imposed for a capital offense. If an offender pleads guilty to a capital offense, the penalty shall be determined by a panel of three judges or, when requested by the offender, by a jury impaneled for the purpose.

(B) The penalty shall be separately determined following a verdict or plea of guilty. The jury or panel of judges shall not consider the penalty when determining the innocence or guilt of the accused, and the jury shall be so instructed before retiring to consider its verdict.

(C) A verdict of guilty duly rendered by a properly constituted jury or panel of judges, or a plea of guilty, is not avoided by the subsequent disability of a juror or judge from participating in determining the penalty. In such case, vacancies on the jury or panel of judges shall be filled in the same manner as vacancies occurring during trial.

(D) Before the jury or panel of judges retires to consider the penalty to be imposed for a capital offense, it shall hear such testimony or other evidence as may be presented, the statement, if any, of the offender, and the arguments, if any, of the counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. The court then shall instruct the jury on its duties in determining the penalty.

(E) The jury or panel of judges shall give due consideration to the criteria contained in section 2929.03 of the Revised Code, in determining the penalty to be imposed on an offender for a capital offense.

(F) The death penalty shall be imposed upon the concurrence therein of all members of the jury or panel of judges, otherwise imprisonment shall be imposed. When the death penalty is returned, the clerk of court shall poll the jury or panel of judges to verify the concurrence therein of each member.

(G) The court shall impose on the offender the penalty provided in section 2929.01, determined pursuant to this section and section 2929.03 of the Revised Code.

CRITERIA FOR IMPOSING DEATH OR IMPRISONMENT FOR A CAPITAL OFFENSE

Sec. 2929.03. (A) In determining whether to impose death or imprisonment for a capital offense, the jury or panel of judges shall consider the nature and circumstances of the offense, and the history, character, and condition of the offender.

(B) The following shall be considered in favor of imposing the death penalty for a capital offense:

(1) The offense endangered the security, or was intended to endanger the security of this or any other state or the United States.

(2) The offense was the assassination, committed for racial, religious, or political reasons, of a high public official, candidate for high public office, or person of renown or veneration.

(3) The offense was committed for hire, or for purpose of gain.

(4) The offense was committed in order to escape detection, apprehension, trial, or punishment for another offense.

(5) The victim of the offense was a law enforcement officer engaged in his duties at the time of the offense.

(6) The victim of the offense was a child under eighteen, an aged or infirm person, or a person who was particularly unoffending or defenseless.

(7) The victim of the offense was tortured or cruelly abused.

(8) The offender has willfully killed, or attempted to willfully kill more than one person, including the victim of the offense at bar.

(C) The following shall be considered in favor of imposing imprisonment for a capital offense:

(1) The offense was the result of circumstances unlikely to recur.

(2) The victim of the offense induced or facilitated it.

(3) There are circumstances tending to mitigate the offense, though failing to establish a defense.

(4) The offender acted under strong provocation.

(5) The offender has no history of prior assaultive offenses.

(6) The offender is likely to respond affirmatively to rehabilitative treatment.

2. The following represent the versions of the proposed provisions on murder penalties that were designated as draft SUBSTITUTE HOUSE BILL NO. 511:

PENALTIES FOR MURDER

Sec. 2929.01. (A) Whoever is convicted of or pleads guilty to capital murder in violation of section 2903.01 of the Revised Code shall be im-

prisoned for life, unless the jury or panel of judges trying the accused recommends that no mercy be shown him, in which case he shall suffer death.

(B) Whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life.

IMPOSING SENTENCE FOR A CAPITAL OFFENSE

Sec. 2929.02. (A) The jury or panel of three judges which tries the offender shall determine whether or not to recommend that no mercy be shown him for a capital offense. If an offender pleads guilty to a capital offense, whether or not to recommend that no mercy be shown shall be determined by a panel of three judges or, when requested by the offender, by a jury impaneled for the purpose.

(B) The jury or panel of judges shall give due consideration to the criteria contained in section 2929.03 of the Revised Code, in determining whether or not to recommend that no mercy be shown an offender for a capital offense.

(C) A recommendation of no mercy shall be returned only upon the concurrence therein of all members of the jury or panel of judges. If a recommendation of no mercy is returned, the court shall impose sentence of death upon the offender. Otherwise, the court shall impose sentence of life imprisonment, as provided in section 2929.01 of the Revised Code.

CRITERIA FOR IMPOSING DEATH OR IMPRISONMENT FOR A CAPITAL OFFENSE

Sec. 2929.03. (A) In determining whether or not to recommend that no mercy be shown an offender for a capital offense, the jury or panel of judges shall consider the nature and circumstances of the offense, and the history, character, and condition of the offender.

(B) The following do not control the discretion of the jury or panel of judges, but shall be considered in favor of recommending that no mercy be shown an offender for a capital offense:

(1) The offense endangered the security, or was intended to endanger the security of this or any other state or the United States.

(2) The offense was the assassination, committed for racial, religious, or political reasons, of a high public official, candidate for high public office, or person of renown or veneration.

(3) The offense was committed for hire, or for purpose of gain.

(4) The offense was committed in order to escape detection, apprehension, trial, or punishment for another offense.

(5) The victim of the offense was a law enforcement officer engaged in his duties at the time of the offense.

(6) The victim of the offense was a person who was particularly unoffending or defenseless.

(7) The offender killed the victim from ambush.

(8) The victim of the offense was tortured or cruelly abused.

(9) The offender has willfully killed, or attempted to willfully kill more than one person, including the victim of the offense at bar.

(C) The following do not control the discretion of the jury or panel

of judges, but shall be considered in favor of showing mercy to an offender for a capital offense:

- (1) The offense was the result of circumstances unlikely to recur.
- (2) The victim of the offense induced or facilitated it.
- (3) There are circumstances tending to mitigate the offense, though failing to establish a defense.
- (4) The offender acted under strong provocation.
- (5) The offender has no history of prior offenses of violence.
- (6) The offender is likely to respond affirmatively to rehabilitative treatment.

(D) The criteria listed in Divisions (B) and (C) of this section shall not be construed to limit the matters which may be considered in determining whether or not to recommend that no mercy be shown an offender for a capital offense.

3. The following represent the versions of the proposed provisions on murder penalties that were passed by the Ohio House of Representatives as SUBSTITUTE HOUSE BILL No. 511:

PENALTIES FOR MURDER

Sec. 2929.01. (A) Whoever is convicted of or pleads guilty to capital murder in violation of section 2903.01 of the Revised Code shall suffer death, unless the jury or panel of judges trying the accused recommends that mercy be shown him, in which case he shall be imprisoned for life. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

(B) Whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life and, in addition, may be fined an amount fixed by the court, but not more than fifteen thousand dollars.

(C) The court shall not impose a fine in addition to imprisonment or death for capital murder, or in addition to imprisonment for murder, unless the offense was committed for hire or for purpose of gain.

(D) The court shall not impose a fine or fines for capital murder or murder which, in the aggregate and to the extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to himself or his dependents, or will prevent him from making reparation for the victim's wrongful death.

(E) Whoever is convicted of or pleads guilty to kidnapping for ransom in violation of Division (A)(1) of section 2905.01 of the Revised Code shall suffer death, unless the jury or panel of judges trying the accused recommends that mercy be shown him, in which case he shall be imprisoned for life. If the offender releases the victim in a safe place unharmed, whoever is convicted of or pleads guilty to kidnapping for ransom shall be imprisoned for an indefinite term of ten years to life.

IMPOSING SENTENCE FOR A CAPITAL OFFENSE

Sec. 2929.02. (A) The jury or panel of three judges which tries the offender shall determine whether or not to recommend that mercy be

shown him for a capital offense. If an offender pleads guilty to a capital offense, whether or not to recommend that mercy be shown shall be determined by a panel of three judges or, when requested by the offender, by a jury impaneled for the purpose.

(B) The jury or panel of judges shall give due consideration to the criteria contained in section 2929.03 of the Revised Code, in determining whether or not to recommend that mercy be shown an offender for a capital offense.

(C) A recommendation of mercy shall be returned upon the concurrence therein of a majority of the members of the jury or panel of judges. If a recommendation of mercy is returned, the court shall impose sentence of life imprisonment upon the offender. Otherwise, the court shall impose sentence of death, as provided in section 2929.01 of the Revised Code.

CRITERIA FOR IMPOSING DEATH OR IMPRISONMENT FOR A CAPITAL OFFENSE

Sec. 2929.03. (A) In determining whether or not to recommend that mercy be shown an offender for a capital offense, the jury or panel of judges shall consider the nature and circumstances of the offense, and the history, character, and condition of the offender.

(B) The following do not control the discretion of the jury or panel of judges, but shall be considered against recommending that mercy be shown an offender for a capital offense:

- (1) The offense endangered the security, or was intended to endanger the security of this or any other state or the United States;
- (2) The offense was the assassination, committed for racial, religious, or political reasons, of a high public official, candidate for high public office, or person of renown or veneration;
- (3) The offense was committed for hire, or for purpose of gain;
- (4) The offense was committed in order to escape detection, apprehension, trial, or punishment for another offense;
- (5) The victim of the offense was a law enforcement officer engaged in his duties at the time of the offense;
- (6) The victim of the offense was a person who was particularly unoffending or defenseless;
- (7) The offender killed the victim from ambush;
- (8) The victim of the offense was tortured or cruelly abused;
- (9) The offender has willfully killed, or attempted to willfully kill more than one person, including the victim of the offense at bar.

(C) The following do not control the discretion of the jury or panel of judges, but shall be considered in favor of showing mercy to an offender for a capital offense:

- (1) The offense was the result of circumstances unlikely to recur;
- (2) The victim of the offense induced or facilitated it;
- (3) There are circumstances tending to mitigate the offense, though failing to establish a defense;
- (4) The offender acted under strong provocation;
- (5) The offender has no history or prior offenses of violence;
- (6) The offender is likely to respond affirmatively to rehabilitative treatment.

(D) The criteria listed in divisions (B) and (C) of this section shall not be construed to limit the matters which may be considered in deter-

mining whether or not to recommend that mercy be shown an offender for a capital offense.

APPENDIX III

A Legislative History in the Ohio House of Representatives of the Proposed Ohio Criminal Code Provisions on Manslaughter, Negligent Homicide, and Vehicular Homicide.

1. The following represent the various stages in the development of the manslaughter provisions in the Ohio House of Representatives:
 - a. The original versions in HOUSE BILL NO. 511:

MANSLAUGHTER

Sec. 2903.03. (A) No person, while under extreme emotional stress for which there is reasonable explanation or excuse, shall knowingly cause the death of another. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the offender's situation at the time of the offense, under circumstances as he believed them to be.

(B) No person shall recklessly cause the death of another. An offense under section 2903.05 of the Revised Code does not constitute an offense under this division.

(C) No person shall cause the death of another by committing any offense of violence. An offense under section 2903.05 or 2903.06 of the Revised Code does not constitute an offense under this division.

(D) Whoever violates this section is guilty of manslaughter, a felony of the third degree.

- b. The version designated as draft SUBSTITUTE HOUSE BILL NO. 511:

MANSLAUGHTER

Sec. 2903.04. (A) No person shall recklessly cause the death of another. An offense under section 2903.06 of the Revised Code does not constitute an offense under this division.

Sec. 2903.05. (B) No person shall cause the death of another by committing any offense. An offense under section 2903.06 or 2903.02 of the Revised Code does not constitute an offense under this division.

(C) Whoever violates this section is guilty of manslaughter, a felony of the third degree.

- c. The versions passed by the Ohio House as SUBSTITUTE HOUSE BILL NO. 511:

VOLUNTARY MANSLAUGHTER

Sec. 2903.03. I (A) No person, while under extreme emotional stress brought on by serious provocation reasonably sufficient to incite him into using deadly force, shall knowingly cause the death of another.

(B) Whoever violates this section is guilty of voluntary manslaughter, a felony of the first degree.

INVOLUNTARY MANSLAUGHTER

Sec. 2903.04. (A) No person shall recklessly cause the death of another. An offense under section 2903.06 of the Revised Code does not constitute an offense under this section.

(B) Whoever violates this section is guilty of involuntary manslaughter, a felony of the third degree.

2. The following represent the various stages in the development of the negligent homicide provision in the Ohio House of Representatives:

a. The original version in HOUSE BILL NO. 511:

NEGLIGENT HOMICIDE

Sec. 2903.04. (A) No person shall negligently cause the death of another by means of a deadly weapon or dangerous ordnance as defined in section 2923.11 of the Revised Code.

(B) Whoever violates this section is guilty of negligent homicide, a misdemeanor of the first degree.

b. The version designated as draft SUBSTITUTE HOUSE BILL NO. 511:

NEGLIGENT HOMICIDE

Sec. 2903.04. (A) No person shall negligently cause the death of another by means of a deadly weapon or dangerous ordnance as defined in section 2923.11 of the Revised Code.

(B) Whoever violates this section is guilty of negligent homicide, a misdemeanor of the first degree.

c. The version passed by the Ohio House as SUBSTITUTE HOUSE BILL NO. 511:

NEGLIGENT HOMICIDE

Sec. 2903.05. (A) No person shall negligently cause the death of another by means of a deadly weapon or dangerous ordnance as defined in section 2923.11 of the Revised Code.

(B) No person shall cause the death of another by committing any offense. An offense under section 2903.06 or 2903.07 of the Revised Code does not constitute an offense under this division.

(C) Whoever violates this section is guilty of negligent homicide, a misdemeanor of the first degree.

3. The following represent the various stages in the development of the provisions on vehicular homicide in the Ohio House of Representatives:

a. The original version in HOUSE BILL NO. 511:

AGGRAVATED VEHICULAR HOMICIDE

Sec. 2903.05. (A) No person, while operating or participating in the operation of a motor vehicle, watercraft, or aircraft, shall recklessly cause the death of another.

(B) Whoever violates this section is guilty of aggravated vehicular homicide, a felony of the fourth degree.

VEHICULAR HOMICIDE

Sec. 2903.06. (A) No person, while operating or participating in the operation of a motor vehicle, locomotive, watercraft, or aircraft, shall negligently cause the death of another.

(B) Whoever violates this section is guilty of vehicular homicide, a misdemeanor of the first degree.

b. The version designated as draft SUBSTITUTE HOUSE BILL No. 511:

AGGRAVATED VEHICULAR HOMICIDE

Sec. 2903.06. (A) No person, while operating or participating in the operation of a motor vehicle, locomotive, watercraft, or aircraft, shall recklessly cause the death of another.

(B) Whoever violates this section is guilty of aggravated vehicular homicide, a felony of the fourth degree. If the offender has previously been convicted of an offense under this section or section 2903.06 of the Revised Code, aggravated vehicular homicide is a felony of the third degree.

VEHICULAR HOMICIDE

Sec. 2903.07. (A) No person, while operating or participating in the operation of a motor vehicle, locomotive, watercraft, or aircraft, shall negligently cause the death of another.

(B) Whoever violates this section is guilty of vehicular homicide, a misdemeanor of the first degree. If the offender has previously been convicted of an offense under this section or section 2903.05 of the Revised Code, vehicular homicide is a felony of the fourth degree.

c. The version passed by the Ohio House as SUBSTITUTE HOUSE BILL No. 511:

AGGRAVATED VEHICULAR HOMICIDE

Sec. 2903.06. (A) No person, while operating or participating in the operation of a motor vehicle, locomotive, watercraft, or aircraft, shall recklessly cause the death of another.

(B) Whoever violates this section is guilty of aggravated vehicular homicide, a felony of the fourth degree. If the offender has previously been convicted of an offense under this section or section 2903.07 of the Revised Code, aggravated vehicular homicide is a felony of the third degree.

VEHICULAR HOMICIDE

Sec. 2903.07. (A) No person, while operating or participating in the operation of a motor vehicle, locomotive, watercraft, or aircraft, shall negligently cause the death of another.

(B) Whoever violates this section is guilty of vehicular homicide, a misdemeanor of the first degree. If the offender has previously been convicted of an offense under this section or section 2903.06 of the Revised Code, vehicular homicide is a felony of the fourth degree.